REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

Court of Common Pleas,

AND

OTHER COURTS.

With Tables of the Cases and Principal Matters.

BY

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AND

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BARRISTERS AT LAW.

VOL. III.

Containing the CASES from TRINITY TERM, 2 GEO. IV., 1821,
TO EASTER TERM, 3 GEO. IV., 1822.

BOTH INCLUSIVE.

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AND J. COOKE, ORMOND-QUAY, DUBLIN.

1822.

JUDGES

OF THE

COURT OF COMMON PLEAS,

During the Period comprised in this VOLUME.

The Right Hon. Sir ROBERT DALLAS, Knt. Ld. Ch. J.

Hon. Sir JAMES ALLAN PARK, Knt.

Hon. Sir JAMES BURROUGH, Knt.

Hon. Sir JOHN RICHARDSON, Knt.

A

TABLE

OF THE

NAMES OF THE CASES

REPORTED IN THIS VOLUME.

N. B. — The Case, the Name of which is printed in *Italics*, is printed from MS. Notes.

Crockford.

Middleton,

ADDENDA ET CORRIGENDA.

VOL. II.

Page 157. in the last line of the 2d column of the note, for "Plaintiff," read "Defendant."

659. last line, for "600," read "300. *b*."

702. line 33 of the marginal note, for "23," read "53."

708. —— 28. for "23," read "53."

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Page 67. line 13. for "as," read "or."

81. —— 3 from the bottom, for "Wyatt v. Francis," read "Francis v. Wyatt."

112. —— for "52 Geo. 3. c. 29," read "52 Geo. 3. c. 59."

Same page, line 6 from the bottom, after "Ireland," at the end of the line, add "respectively."

—— 8 from the bottom, for "coastwise," read "coastways."

—— 9 from the bottom, dele "and."

—— 10 from the bottom, for "let, pass," read "letpass."

—— 17 from the bottom, for "biscuits," read "biscuit."



CASES

ARGUED AND DETERMINED

IN THE

Court of COMMON PLEAS,

AND

OTHER COURTS,

IN

Trinity Term,

in the Second Year of GEO. IV.

GRIFFITH v. CROCKFORD and Another.

June 26.

Omission to add the *similiter*, is an irregularity for which the Court will set aside the verdict.

THIS was an action of replevin, to which there was an avowry and plea in bar concluding to the country. The jury having found a verdict for the avowants,

Peake Serjt., in the last term, obtained a rule *nisi* to set aside the verdict for irregularity, with costs, on the ground that the avowants had carried down the issue to trial without adding a *similiter* to the usual conclusion of the plea in bar.

Taddy Serjt., who shewed cause against the rule, cited *Sayer* v. *Pocock*. (a)

The *Court* made the rule absolute, but without costs. (b)

(a) *Cowp.* 407.
(b) But see 2 *Wms. Saund.* 319. *n.* 6., and *Tidd.* 947., ed. 6.

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June 29.

SUMMERSETT v. JARVIS and Others.

A jury having found that a keeper of hounds, who bought dead horses for his dogs, and then sold the skins and bones for a profit, was not thereby a trader, the Court refused to grant a new trial, or to disturb the verdict.

The Plaintiff, against whom a commission of bankrupt had been wrongfully issued, being required by the assignees under the commission to deliver up his books, did so: Held, that he might recover of the assignees in trover, without formally demanding a restoration of the books.

TROVER for sundry account-books and other property. At the trial before *Dallas* C. J., *Guildhall* sittings after *Hilary* term last, the Defendants, who were assignees under a commission of bankrupt, which had been issued against the Plaintiff (a farmer, who kept hounds), proved that he, having purchased for his hounds a number of dead horses, had been accustomed to sell the skins and bones; and, upon one occasion, said he should make a good thing of them. The Plaintiff's witnesses said the dead horses were purchased expressly for the dogs, and never with any view of ulterior profit. They also proved that the Defendant *Jarvis*, in the character of assignee, had insisted on the Plaintiff's delivering up his books, and that he thereupon delivered them; but it was not proved that the Plaintiff had demanded the books of the Defendants previously to the commencement of this action. The jury having found a verdict for the Plaintiff, and that he was not a trader when the petitioning creditor's debt accrued,

Taddy Serjt., on a former day, obtained a rule *nisi* to set aside this verdict and enter a nonsuit instead, or for a new trial, on the ground, first, that the verdict was against evidence; secondly, that the Plaintiff having delivered his books for a legal purpose to the assignees, when called on to do so, had not parted with them on compulsion, so that until a formal demand was made by the Plaintiff, the Defendants were guilty of no conversion; and such demand having never

 been

been made, the Plaintiff could not maintain his action. *Nixon* v. *Jenkins*. (*a*)

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Lens Serjt., for the Plaintiff, contended that the delivery above stated was a delivery on compulsion; that, therefore, a demand on the part of the Plaintiff was unnecessary; and that the supposition of the Plaintiff's having been a trader was completely disproved, because, if a man bought a thing for his own use, and happened to have more than he wanted, his selling the surplus would not make him a trader.

Taddy and *Peake* Serjts. having been heard in support of the rule, and having referred to *Jarrett* v. *Leonard* (*b*),

The *Court* expressed a clear opinion that the facts of this case did not constitute a trading, within the intent of the bankrupt laws; that the Defendants having taken the books when they were armed with the authority of assignees, the Plaintiff must be deemed to have delivered them up on compulsion; that the Defendants were thereby guilty of a conversion; and that, consequently, the Plaintiff's action was maintainable, without any formal demand on his part.

Rule discharged.

(*a*) 2 *H. Bl.* 135. (*b*) 2 *M. & S.* 265.

BUTT *v.* CONANT.

July 2.

Costs.

VAUGHAN Serjt. moved for a rule calling on the Defendant to shew cause why the Plaintiff (*a*) should not be discharged out of custody, in execution

(*a*) See *Ante*, I. 742.

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for costs, the costs (as was alleged by affidavit) having been paid to the Defendant by the Treasury.

But the Court thought this not a sufficient ground for granting the rule, as it did not appear the costs had been paid for the Plaintiff; and

Vaughan took nothing by his motion.

July 3.

WATSON v. PILLING.

A Defendant may be declared against as administrator, though the process only describes him generally.

HULLOCK Serjt. had obtained a rule calling on the Plaintiff to shew cause why the notice of declaration in this case, and the declaration filed by the Plaintiff against the Defendant, and all subsequent proceedings had thereon, should not be set aside for irregularity. The irregularity imputed, consisted in the Plaintiff's having, on general process, declared against the Defendant as administrator. It was admitted that, on general process, the Plaintiff may declare as executor or administrator (*a*); but it was contended that the rule did not hold *è converso*; that if the present practice were held to be regular, the Plaintiff would in fact declare by the bye, before he declared in chief; because, if he had declared in chief, his declaration must have been against the Defendant in his own right; and that such a course might greatly inconvenience an administrator, as he could not (if it were allowed) safely pay simple contract debts after the commencement of an action, and before the filing of declaration. *Lloyd* v. *Williams* (*b*)

(*a*) *Tidd.* 150. (*b*) 2 *Bl.* 722.

was

was referred to; but it was admitted there was no authority in point. 1821.

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Lens Serjt., in shewing cause against the rule, argued that the object of the process being only to compel appearance, the rule must be taken to be the same with respect to Plaintiff and Defendant, and that a Plaintiff described generally in the process might declare particularly; and he cited *Foster* v. *Bonner* (a), and *The Weavers' Company* v. *Forrest*. (b)

Hullock was heard in support of his rule.

DALLAS C.J. If the argument urged for the Defendant were just, a Plaintiff could only declare in trespass while the process of the Court remains in its present form; and, it is admitted, there is no authority for the rule the Defendant seeks to enforce. In truth, the object of the writ is only to bring the Defendant into court. It is the declaration which discloses the cause of action; and, on this short ground, the rule must be

Discharged.

(a) *Cowp.* 455. (b) 2 *Str.* 1232.

CAMPION *v.* BENYON and Another.

July 3.

A patent was taken out "for an improved method of making sail-cloth without any starch whatever." The improvement or discovery (if any) consisted in a new mode of texture, and not in the exclusion of starch, the advantage of excluding which had been discovered and made public before: Held, that the patent was void, as claiming, in addition to what the patentee had discovered, the discovery of something already made public.

CASE for an infringement of patent right. Plea, general issue. The patent empowered the Plaintiff, his executors, administrators, and assigns, during the

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term of 14 years, to make, use, exercise, and vend the invention therein mentioned; (to wit)

"A new and improved method of making and manufacturing double canvass and sail-cloth with hemp and flax, or either of them, without any starch whatever."

In which letters patent the usual proviso was contained, "That if the said *Robert Campion* should not particularly describe and ascertain the nature of his said invention, and in what manner the same was to be performed, by an instrument in writing under his hand and seal, and cause the same to be enrolled in the High Court of Chancery, within two calendar months next and immediately after the date of the said letters patent, that then the said letters patent, and all liberties and advantages whatever thereby granted, should utterly cease, determine, and become void."

In pursuance of this provision, the Plaintiff made out and executed the following specification of the invention.

"I, the said *Robert Campion*, do hereby describe and ascertain the nature of my said invention, and the manner in which the same is to be performed, as follows: (that is to say) my new and improved method of making and manufacturing double canvass and sail-cloth with hemp and flax, or either of them, without any starch whatever, consists in first spinning the warp-yarn, either by hand or with the sort of machinery generally used for such purposes, without water or dampness of any kind whatever; afterward, properly cleansing and bleaching the same in the best manner; and, having made it perfectly dry from that process, placing and working it on a machine similar to those commonly used in cotton manufactories, round the upper bobbins of which machine the same is rolled in single threads, so as that when the said machine is put in motion in the usual manner, the effect thereof is to untwist those threads, and take out of them all the twist that was

made

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made therein by the operation of spinning, and to twist or interweave two of them into one thread, or into half the number of other bobbins in the lower part of the said machine, the reverse or contrary way to that in which the single thread or warp had been before twisted. By this process, the yarn is not so hard twisted as at first; and, in the operation of thus reversing the twist, the fibres of the flax are so closely united, and are laid or arranged so perfectly level or even in every respect, as to render the warp-yarn or threads much stronger than any double threads are by the usual mode of manufacture with starched chains. The double threads or warp-yarn being thus prepared and twisted together into one chain or warp, the same is thereby preserved from injury whilst passing through the hay-walk in the subsequent operations of weaving; and thus, the necessity of using any starch, or substitute for starch whatever, which, in the ordinary mode of manufacture is used only for the purpose of winding the two threads or warp, and making them smooth, so as to pass through the hay-walk with facility and without injury, is altogether superseded. The canvass thus manufactured is much more pliant than what is made with starch, or in any other manner, and is stronger, not only because its being so very regular and even, necessarily makes the stress equal in every part, but because, in consequence of there being no starch used in the manufacture, the weight of that material, which is considerable in every web or piece, must be supplied by an additional quantity of warp and woof, and being soft and pliant it will thicken when used, and become of a closer texture, without breaking or running up, or being liable to mildew or turn black. Where hemp is used in the manufacture, I hackle the same with soft soap, and a very small proportion of oil, in preference to the entire use of oil, as generally practised; for this preparation lays the fibres as even as oil does, and at the same time coun-

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counteracts the viscous qualities of the hemp, and, with a proper quantity of pearl or potash, assists in bleaching the yarn, and obtaining a good colour in that process; the advantages of my invention, of course, extend to canvass made of unbleached yarn; and the only difference in the manufacture thereof, is the process of bleaching being then dispensed with."

At the trial, before *Dallas* C. J. (*London* sittings after last *Hilary* term), it was proved, that double sail-cloth had been made without starch ever since the year 1803, particularly by Mr. *Dempster*, and that the exclusion of starch was an improvement of great importance. But the Plaintiff's witnesses deposed, that his process for making unstarched sail-cloth was new, and different from the process pursued by the Defendant for making unstarched cloth, particularly as to reversing the original twine; and that by this means the Plaintiff produced a better article. Some of the Defendant's witnesses denied that the process pursued by the Plaintiff differed from the Defendant's process. One of them said the process of reversing the twine was far from being new or original, and that the wrapper of an *Egyptian* mummy, which he had examined, was woven in the same manner.

Dempster's specification was as follows: "Instead of using single yarns not twisted, but glued together with starch or other mucilage, in order to form the warp of the canvass, as is now commonly done, to the great injury of the article, by rendering it liable to spontaneous destruction by mildew, I use twine, composed of two or more yarns of prime material of equal size and strength, both for the warp and woof, and I am by that means enabled to weave, and I do weave my canvass, without starch, or any other mucilage whatever, and I do thereby produce an article nearly twice as strong as common canvass of the same

weight

weight and fineness, and with the advantage, that its threads have an equal bearing on one another, in all directions; not liable, like the common canvass, to split longitudinally, being much stronger in the cross direction, not capable of rot or mildew from the presence of mucilage, and extremely durable, because it is subject to no irregular action of sharp cutting threads on its woof, but is only exposed to the fair, slow, and gradual wear of its well combined and duly proportioned component parts, which maintain their relative strength to the last."

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The jury found a verdict for the Plaintiff.

Lens Serjt., on a former day, obtained a rule *nisi* to set aside this verdict and enter a nonsuit, or have a new trial, on the ground (among other objections to the verdict) that the patent was taken out for more than the Plaintiff could claim as his own discovery; the patent appearing to claim for the Plaintiff the discovery of the process of making sail-cloth without starch.

Vaughan and *Pell* Serjts. now shewed cause against the rule, and contended, that though there might have been some colour for the objection, if the patent had been taken out simply for a method of making sail-cloth without starch, yet, that the Plaintiff having taken it out for an *improved* method of making sail-cloth without starch, shewed clearly, that he did not claim the original discovery of the advantage of rejecting starch, but a mere improvement in the fabric of unstarched cloths; and that the language in which patents for improvements on the discoveries of others were usually framed, corresponded with the expressions here employed.

Lens and *Hullock* Serjts., in support of the rule, contended, that the language of the patent, "an improved method of making sail-cloth without any starch *whatever*,"

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ever," shewed that the Plaintiff intended to claim the discovery of the advantage of rejecting starch, as well as an improvement in the fabric of the unstarched cloth. If he had intended to claim only the discovery of an improved mode of fabricating unstarched cloth, he should have called his invention "an improvement in the method of making, without starch, double sail-cloth." [*Richardson* J. In some specifications the party goes on to say, such things I do not claim.] The patent should have been confined to what the Plaintiff could call his own; and if it contains something of his own and something of another's, it is bad, because it claims too much, or even because of the very ambiguity as to the extent of what the patentee is entitled to. *Turner* v. *Winter.* (*a*) *The King* v. *Arkwright.* (*b*) *The King* v. *Else.* (*c*) *Hill* v. *Thompson.* (*d*) *Macfarlane* v. *Price.* (*e*) *Lord Cochrane* v. *Smethurst.* (*f*)

DALLAS C. J. What is the fair import of this patent as compared with the specification, is now the only question for us to decide, it being unnecessary to enter into any other. With respect to patents, every patent being a monopoly, that is, an infringement of public right, and having for its object to give the public warning of the precise extent of the privilege conferred on the patentee, the Court (without going into the controversy whether it is politic that such privileges should be conferred or not) is bound to require that such warning should be clear, and accurately describe what the inventor claims as his own. If the instrument contain any ambiguity on a material point, that is a ground on which it may be avoided altogether.

(*a*) 1 *T. R.* 602.
(*b*) *Bull. N. P.* 77. 6th ed.
(*c*) 11 *East*, 109.
(*d*) 3 *Merivale*, 629. 2 *B. Moore*, 424. *S. C.* VIII. *Taunt.*
(*e*) 1 *Starkie, N. P. C.* 199.
(*f*) 1 *Starkie, N. P. C.* 205.

Having

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Having premised thus much, let us see for what the present patent is granted. It is agreed that the instrument is not altogether a subject of legal, but in some degree of grammatical, construction; for, if the instrument be chargeable with grammatical ambiguity, it cannot give that clear description which every man who reads may understand. The patent is "for a new and improved method of making and manufacturing double canvass and sail-cloth with hemp and flax, or either of them, without any starch *whatever*." On reading this, how is a common person to decide? The discovery claimed is not simply a method of making double canvass and sail-cloth, but a new and improved method; and in what is this new and improved method stated to consist but in the making the cloth without any starch whatever? From the time I first read the patent down to the present day, I thought that the object of the patentee was to make cloth without starch. Then as to the specification, if that be different from the patent, the whole is void; if it coincides, it is open to the same objection as the patent. But the specification, after describing the operation of spinning, and after stating that thereby the necessity of using any starch, or substitute for starch whatever, is superseded, proceeds to allege that "the canvass thus manufactured is much more pliant than what is made with starch, or in any other manner; and is stronger, not only because its being so very regular and even, necessarily makes the stress equal in every part, but because, in consequence of there being no starch used in the manufacture, the weight of that material must be supplied by an additional quantity of warp and woof; and being soft and pliant, it will thicken when used, and become of a closer texture, without breaking or running up, or being liable to mildew or turn black." Whether we look to the patent or the specification, I have no doubt that the

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claim of the Plaintiff is too extensive: it is not confined to an improved method of weaving the cloth or twisting the threads, but also comprehends another mode of proceeding, which is not a new discovery.

PARK J. There can be no doubt that ingenious men, who incur labour and expence in the production of inventions advantageous to the public, have a fair claim to be indemnified by the exclusive privilege of a patent. But, on the other hand, it is important that the public should have the means of turning such inventions to account, after the inventor has been satisfied for his trouble; and it is for this reason, among others, that every patent ought to contain a clear statement of what the party has accomplished. An unlettered person, who read this patent, would conceive that the patentee's improvement consisted in manufacturing sail-cloth without starch. But, in order to see with more precision what the party meant to claim, we must look to the specification; and this it is impossible to read, without thinking, that the omission of starch was the principal part of the improvement which the patentee meant to claim as his own. In *his* process, he tells us, the necessity of using starch is superseded, and mildew thereby entirely prevented. But if he only meant to claim as his own, an improved mode of texture or twisting the thread, to be applied to the making of unstarched cloth, he might have guarded against ambiguity by disclaiming, as his own discovery, the advantage of excluding starch. Proceeding on the specification, it is impossible that this patent can be supported; for though a patent for an improvement on an old discovery may be sustained, a patent which, in addition to the merit of the improvement, claims the merit of the old discovery, can never be permitted to vest in the patentee an exclusive privilege for the old discovery.

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BURROUGH J. All the cases, and the reason of the thing, shew that a patent can only be sustained for a new discovery; and the specification must support the patent. Now, what is this patent for? — "A new and improved method of making and manufacturing double canvass and sail-cloth, without any starch whatever." And what has really been the discovery, if it be a discovery? — A new method of preparing or twisting the hemp or flax; and the patent should have been taken out for that alone. I am clear that this is bad on the title, the patent, and the specification: the king has been deceived, and the patent is void.

RICHARDSON J. The Plaintiff must be nonsuited, on the ground that the patent is taken out for more than he has discovered. On this point, the law is clear. If the specification had guarded against misapprehension on the part of the public, by stating that the patentee claimed no merit for the exclusion of starch, it is not impossible but that the patent might have been valid. The principle is, that though ingenious men ought to be rewarded for their discoveries, the public at large and other ingenious men ought not to be restrained from doing whatever is not peculiar to the process employed by the patentee. The specification in this case, from beginning to end, refers to the advantages to be derived from the exclusion of starch in the manufacture of sail-cloth; and as that is not a discovery which the Plaintiff can call his own, his patent cannot be sustained.

Rule absolute for a nonsuit.

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July 4.

JENKINS and Another *v.* REYNOLDS.

"To the amount of 100*l.* consider me as security on *J. C.*'s account (signed and dated):" Held, not a sufficient memorandum (under 29 *Car.* 2. *c.* 3. *s.* 4.) of an agreement to pay for the default of *J. C.*

IN this case, the first count of the declaration stated, that, on the 27th *April*, 1815, in consideration that the Plaintiffs, at the request of the Defendant, would sell and deliver on credit, to *James Cowing* and Co. certain goods, wares, and merchandizes, the Defendant undertook and promised the Plaintiffs to be security to them on the account of the said *James Cowing*, by the style, &c. of *James Cowing* and Co., to the amount of 100*l.* That the Plaintiffs, confiding in the promise, did afterwards, on divers days and times, sell and deliver to *Cowing*, on certain credit, agreed upon between the Plaintiffs and the said *Cowing*, divers goods, wares, and merchandizes, amounting in the whole to 300*l.*; and that although the said credit and time of payment had long since elapsed, *Cowing* had not paid, whereof the Defendant had notice; yet that he had not paid the Plaintiffs the said sum of 100*l.*, or any part thereof, but the whole remained due. The second count stated, that, in consideration that the Plaintiffs, at the like request of the Defendant, would sell and deliver on credit to *Cowing*, certain other goods, &c. the Defendant undertook and promised the Plaintiffs to be accountable to them for the payment, by *Cowing*, of the price of such last-mentioned goods, to the amount of 100*l.* The count then proceeded with similar averments, as in the first count, and assigned breach accordingly. The declaration also contained counts for goods sold and delivered, and money paid, laid out, and expended by the Plaintiffs to the Defendant's use, and on account stated.

The Defendant having pleaded the general issue, the cause came on to be tried before *Dallas* C. J., at

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at the *Westminster* sittings after *Hilary* term, 1820, when a verdict was found for the Plaintiffs, damages 100*l.*, subject to the opinion of the Court on the following case, with liberty to the Defendant to move to enter a nonsuit. A motion was accordingly made, and a rule to shew cause granted, which rule coming on in last *Hilary* term, the Court ordered the question to be brought before them on the following case.

The Plaintiffs are *Manchester* warehousemen, and had had dealings with *James Cowing*, who had carried on business in the style and firm mentioned in the declaration, and had become bankrupt shortly before *April*, 1815. On or about the 27th *April*, 1815, *Cowing* delivered the following letter, which was written and signed by the Defendant to the Plaintiffs, *viz.*

"To Messrs. *Jenkins* and *Jones*.

"Gentlemen,

"To the amount of 100*l.*, be pleased to consider me as security on Mr. *James Cowing* and Co.'s account.

"I am, gentlemen, your obedient servant,

"*Samuel W. Reynolds*, 47, *Poland Street*."

1815, *April* 27.

Subsequently to the delivery of this letter to the Plaintiffs, they supplied *Cowing* with several parcels of goods on credit at several times, between the 27th of *April*, 1815, and the month of *September*, 1819, to a large amount, and in the month of *September*, 1819, *Cowing* again stopped payment, and there being upwards of 200*l.* due from him to them on account of goods supplied, this action was brought, for the purpose of recovering 100*l.* from the Defendant, by virtue of and under his letter of the 27th *April*, 1815, and the question for the opinion of the Court is —

Whether the Plaintiffs are entitled to recover that sum from the Defendant? If the Court should be of

opinion

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opinion that the Plaintiffs are entitled to recover in this action, the verdict is to stand; but if the Court should be of a contrary opinion, then a nonsuit is to be entered.

Peake Serjt., for the Plaintiffs. Before the passing of the statute of frauds, any promise by one person to pay the debt, or answer for the miscarriage of another, would have been binding, though there was no written evidence of the promise; and the act was passed, not to vary the liability of such a party, but merely to alter the evidence by which such liability should be established. The intention of the framers was, to save a party from being charged, by perjury, with a contract to which he might be an entire stranger; and it should seem, therefore, that any memorandum, however scanty, if signed by the party to be charged, would completely exclude the mischief proposed to be obviated by the statute. A consideration, indeed, is necessary to the validity of the promise, at present, as well as before the statute was passed; but that consideration being stated in the declaration, and duly proved, the object of the statute, with respect to evidence of the mere existence of the agreement is sufficiently answered by a bare memorandum of the contract. It can be no more necessary to set out the whole agreement under the 4th section than under the 17th section of the statute, and under that section it has been expressly decided (*a*), that a bare memorandum signed by the party is sufficient. It should seem, therefore, that *Wain* v. *Warlters* (*b*), where a different doctrine is held, cannot be well decided. *Stadt* v. *Lill* (*c*), and *Bateman* v. *Phillips* (*d*),

(*a*) *Egerton* v. *Matthews*, 6 *East*, 307.

(*b*) 5 *East*, 10.

(*c*) 9 *East*, 348.

(*d*) 15 *East*, 272.

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are authorities in favour of the Plaintiffs; and in *Goodman* v. *Chase* (*a*), *Abbott* J. says, "Suppose a promissory note in these words, *I hereby agree to pay the bearer 20l.*, would not that be a good negotiable security, and available in law?" It seems, from *Morris* v. *Stacey* (*b*), that *Gibbs* C. J. disapproved of *Wain* v. *Warlters*; and in *Ex parte Minet* (*c*), Lord *Eldon* has directly impugned *Wain* v. *Warlters*; and though it may be difficult to understand what is there said about considerations, Lord *Eldon* probably meant, it was not necessary that, in cases of this description, there should be a beneficial consideration moving to the Defendant. In *Ex parte Gardom* (*d*), he implies, that it is immaterial whether the consideration to the Defendant appear on the writing. If the word agreement, in the fourth section of the statute is to be taken in its strict sense, as implying the whole terms of the contract, then are all the cases in equity, enforcing agreements signed by a single party, wrongly decided; as *Bird* v. *Blosse* (*e*), *Moore* v. *Hart* (*f*), *Seton* v. *Slade* (*g*), *Fowle* v. *Freeman*. (*h*) At all events, it may be contended, that the consideration here is sufficiently expressed, when it appears to be the giving credit to *Cowing*.

Hullock Serjt., for the Defendant. The consideration for the Defendant's promise no where appears. Before the statute, a promise without consideration would have been void, and the reducing such a promise to writing, under the direction of the statute, will not render it valid. *Forth* v. *Stanton* (*i*), *Rann* v. *Hughes*. (*k*) Therefore, if this agreement had been put on record, it would have been bad in arrest of judgment; any

(*a*) 1 *B.* & *A.* 299.
(*b*) 1 *Holt. N. P. C.* 154.
(*c*) 14 *Ves. jun.* 190.
(*d*) 15 *Ves. jun.* 288.
(*e*) 2 *Vent.* 361.
(*f*) 1 *Vern.* 110.
(*g*) 7 *Ves. jun.* 265.
(*h*) 9 *Ves. jun.* 350.
(*i*) 1 *Saund.* 209.
(*k*) 7 *T. R.* 350. *n.*

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parol evidence of an agreement with a sufficient consideration, would have been a variance from the contract stated on record, and, if admitted, might have let in all the mischief which the statute proposes to prevent; for perjury concerning the consideration, might cause as much injustice as perjury concerning the existence of the agreement. Memoranda under the 17th section of the statute always refer to the object of sale, and therefore include the consideration. *Lyon* v. *Lamb.* (*a*) In all the cases in Chancery touching specific performance, the letters on which the decree has turned state the terms of the agreement. The consideration also appeared in *Bird* v. *Blosse*, and *Fowle* v. *Freeman.* As to *Ex parte Minet*, it is impossible to understand what the Chancellor is there made by the reporter to say about considerations, the doctrine laid down being contrary to the uniform course of the common law. *Sadler* v. *Hawkes.* (*b*) But *Ex parte Minet* and *Ex parte Gardom* are the same in effect as *Stadt* v. *Lill*, where the consideration sufficiently appears. So that there seems to be no reason for impugning the authority of *Wain* v. *Warlters*, which has been expressly upheld in the late case of *Saunders* v. *Wakefield.* (*c*)

Peake was heard in reply.

DALLAS C. J. This question arises on the construction of the fourth section of the statute 29 *Car.* 2. *c.* 3. *s.* 4., and it has been considered on two grounds; first, as if it were an original question on the construction of the statute; secondly, not as an original question, but as a point already affected by various decisions.

I shall consider it first on the first ground; and, the question turning on the construction of a statute, we must have recourse to those rules by which the intent of

(*a*) *Fell on Merc. Guar.* 260. 2d ed.

(*b*) 1 *Roll. Ab.* 27. *pl.* 49.

(*c*) 4 *B.* & *A.* 595.

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of statutes of doubtful meaning is usually expounded; we must therefore consider what the law was previously to the passing of that statute. It is agreed that, previously to the passing of that statute, no writing was necessary for the validity of a contract such as the present, and it is also agreed that, before the passing of the statute as well as since, a consideration *was* necessary. That being so, and considering the object of the statute, let us see whether the statute has made any difference between a promise and its consideration, so as to fall into this inconsistency, that, while it requires the promise to be in writing, it allows the consideration for it to be committed to oral testimony; and it seems to me that this would be a strong conclusion to come to, because, if the design of the statute were to obviate the mischief of perjury, that design would not be accomplished unless the consideration, as well as the promise, were reduced to writing. However, we must recur to the words of the statute; they are, "No action shall be brought whereby to charge the Defendant upon any special promise to answer for the debt, default, or miscarriage of another person, — unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." Now, on the one side, it is contended, that *promise* and *agreement* in this clause are synonymous, and that a promise in writing to pay the debt of another, is in fact the agreement or undertaking to do so; but that depends on the construction of the word promise, accompanied as it is by the words at the end of the clause, and upon those words there is the same reason for having the consideration in writing, as for having the promise in writing, because the consideration is part of the agreement between the parties. I should say, as was said by

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Lawrence J. in *Wain* v. *Warlters*, "If the question had arisen merely on the first part of the clause, I conceive that it would only have been necessary that the *promise* should have been stated in writing; but it goes on to direct that no person shall be charged on such *promise* unless the *agreement*, or some *note or memorandum thereof*, that is, *of the agreement*, be in writing; which shews that the word *agreement* was meant to be used in a sense different from *promise*, and that something besides the mere promise was required to be stated. And as the consideration for the promise is part of the agreement, that ought also to be stated in writing." But the statute seems to me to distinguish between *promise* and *agreement*; for, unless such distinction had been intended, it would have been material to say, that no action should be brought on any promise, unless the promise were in writing; but, instead of adopting the word *promise* in the last part of the clause, the legislature has employed a different word, namely, the word *agreement*, and no one can say that *promise* and *agreement* are the same in their popular signification. In the construction of the clause, the terms to be attended to are, *promise*, *agreement*, and *memorandum in writing*. What is an agreement, but the consent of two persons to the same thing? — and, to render that valid, there must be a consideration. If, therefore, *agreement* means more than *promise*, the agreement itself, or some note or memorandum of it must appear; by *memorandum*, I mean, not the whole detail of what has been agreed on, but such a note as to render oral testimony unnecessary, towards proving what is of the essence of the contract.

Therefore, without going through the authorities, I am of opinion, that the consideration does not appear upon the writing, and that, therefore, the terms of the statute have not been complied with: but, without any invidious distinction, the weight of the authority is this

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way; first, in *Wain* and *Warlters*, then in *Lyon* v. *Lamb*, and now lately in *Saunders* v. *Wakefield*.

PARK J. Agreeing as I do in all that has fallen from my Lord Chief Justice, it is not necessary for me to consider the question before us at great length; but, looking at the statute, I should say that no doubt could exist on the subject. If, before the passing of the statute, a consideration was necessary to the validity of an agreement, it would be singular, if the object of the statute was to exclude perjury, that the consideration should not be reduced to writing as well as the promise; although, therefore, the rule of law was so far altered by the statute, as to render writing necessary, where oral testimony would have sufficed before, yet all that was essential to be proved before by oral testimony, must now appear on the face of the writing.

It has been argued, that there are no grounds for any distinction between the matters disposed of in the 17th section of the statute, and those mentioned in the 4th. But as the 17th relates to the sale of property, the memorandum under that section must shew the consideration when it refers to the subject of sale; while, under the 4th section, which relates to contracts for the benefit of a third person, the consideration cannot be known unless distinctly expressed, and it is this circumstance which manifestly distinguishes *Wain* v. *Warlters* from *Egerton* v. *Matthews*. To advert to the case of *Wain* v. *Warlters*. The judges who decided that case were all of them persons of great eminence, and the matter was duly considered. They all go at length into the question, and come to a clear conclusion, that the consideration must appear. I do not go into the question, whether the fact was well decided in *Wain* v. *Warlters*, (because there may be different opinions, as to whether or no a consideration did appear on the instrument

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which was there the subject of discussion,) but on principle the decision was right. In *Egerton* v. *Matthews*, the Judges do not shake the decision in *Wain* v. *Warlters*, and *Egerton* v. *Matthews* came on some time after *Wain* v. *Warlters* had been the subject of general discussion. Then, in 1807, came *Lyon* v. *Lamb*, in which the Judges were unanimous, (whether they were right as to the fact, whether or no a consideration did in that case actually appear, I do not say, but) on principle they held, that the consideration must appear. The Lord Chief Baron says (*a*), "a promise may be voluntary, but an agreement to be binding must contain a mutual engagement upon an adequate consideration: and to prevent frauds and perjuries within the meaning and scope of the statute, such engagement and consideration should be in writing; otherwise a door is opened to all the evils which the statute was meant to remedy."

In *Saunders* v. *Wakefield*, four new judges of the King's Bench have just determined, that an agreement on which the consideration does not appear is void under the statute, and they have expressly upheld *Wain* v. *Warlters*: so that here are twelve Judges all concurring in the same opinion. It is urged, indeed, that we decide against the opinion of a very learned person in another court, but in all the cases decided by him, the consideration has as sufficiently appeared, as it did in *Stadt* v. *Lill*, *Bateman* v. *Phillips*, and *Morris* v. *Stacey*. We have also been pressed with the opinion of *Gibbs* C. J., but in *Morris* v. *Stacey*, where that opinion is given, the consideration appeared, and the opinion itself is by no means clear or decisive. As no consideration whatever is expressed in the present case, the promise might have been made to cover a gambling debt, or any other transaction of the most improper description. The inclination, therefore, of my mind is, to support the decision of *Wain* v. *Warlters*.

(*a*) *Fell on Merc. Guar.* 260.* 2d ed.

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BURROUGH J. It is not necessary for us to refer to the case of *Wain* v. *Warlters*; we may act on the principle; and the principle is, that the substance of the agreement must appear on the memorandum. Now, the consideration is the most material part of the substance of the agreement; but in this agreement there is no statement of any consideration whatever, so that if an agreement with a consideration had been given in evidence, the agreement described in the declaration would have varied from the agreement so given in evidence. The case of *Wain* v. *Warlters* (if it were necessary to refer to it) has been acted on by twelve Judges, and are we to say that they have been all mistaken? I am of opinion, that the Plaintiffs are not entitled to recover.

RICHARDSON J. The object of the statute of frauds was to prevent perjury or subornation of perjury, by causing that to be reduced to writing, which before might have been proved by oral testimony, and such a construction ought to be put on the clause in question as will best effect the intentions of the legislature. Now, is this memorandum such as will satisfy those intentions? On the face of the memorandum, it does not appear whether the agreement relates to a past or a future transaction; it might apply to either, or even to an illegal debt; whatever is necessary to render it available must be supplied by oral testimony, and with that view the declaration is framed, stating the promise to have applied to a future supply of goods. Supposing that to have been so, and suppose the Plaintiffs, instead of supplying goods had advanced money, — that would not have fallen within the intention of the guarantee, but it would have rested altogether on the conscience of the witness, to say whether the guarantee applied to the one or the other; and parol evidence so let in would

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lead to the very perjury, or subornation, which it was the object of the statute to exclude. The statute requires that the substance of the cause of action should appear in writing, and the consideration is the substance of an agreement. But they who framed the clause were aware that it would be dangerous to leave the word agreement unaccompanied, because, that might have occasioned difficulty through excess of strictness; they, therefore, allowed a memorandum of the agreement to be made, which, though it should not state the whole agreement in detail, should sufficiently disclose the substantial cause of action. And this is the meaning of what fell from the Court in the case of *Wain* v. *Warlters*. It is not necessary now to decide, whether the application of the principle was right, but whether the principle itself recognised in that case was right. In *Stadt* v. *Lill* it was decided, that a guarantee did satisfy the terms of the statute, because the guarantee imported, that the promise was made concerning a delivery of goods, and that would be a good consideration. So, in *Bateman* v. *Phillips* the consideration was sufficiently shewn: but it has been urged, that in *Egerton* v. *Matthews*, a construction has been put on the 17th section of the statute, different from the construction put on the 4th. I think not; nor was that necessary, for the consideration of the promise sufficiently appeared in that case. The words of the 17th section are, "That some note or memorandum in writing of the *bargain* be made and signed." Suppose a person on buying goods were to give as a memorandum, "I will pay 50*l.*" I think that would not be a good note of the bargain under the 17th section; but in *Egerton* v. *Matthews*, the ground of the promise was sufficiently shewn, so that, by that case the Court of King's Bench have not shaken the case of *Wain* v. *Warlters*. *Lyon* v. *Lamb* and *Saunders* v. *Wakefield* are both in point, and the latter is very near the

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the present case, though perhaps the note or memorandum in *Saunders* v. *Wakefield* is the more full of the two. As to the *dictum* of the Lord Chancellor, I do not find any decision of his conflicting with the doctrine now laid down: no equity case has been cited inconsistent with *Wain* v. *Warlters*, as the consideration has appeared in all of them. Neither the Judges who decided *Wain* v. *Warlters*, nor those who have upheld that case, ever meant to say that both parties should sign the agreement, but only the party to be charged by it, and that the consideration should sufficiently appear. No consideration appears on the agreement in this case, and therefore, there must be a

Judgment of nonsuit.

ADAMS, Gent., v. LUCK.

July 5.

Amendment.

THE Court allowed *Hullock* Serjt. (on payment of costs and the costs of the rule by the Plaintiff) to amend (*a*) the return of his attachment of privilege in this cause, which *Vaughan* Serjt., on the authority of *Miles* v. *Bond* (*b*) and *Kenworthy* v. *Peppiat* (*c*) had obtained a rule *nisi* to set aside, for the irregularity of being returnable after the essoin day and before the *quarto die post*, instead of being returnable on a day certain in full term.

(*a*) See *Walker* v. *Hawkey*, 5 *Taunt*. 853.

(*b*) 1 *Str*. 399.

(*c*) 4 *B. & A.* 288. In this case the amendment was refused.

July 6.

FRANCIS v. NEAVE, Bart., Sheriff of ESSEX.

In an action for an escape, the sheriff's authority for appointing a bailiff, was proved by a person belonging to the sheriff's office, who had indorsed the bailiff's name on the writ produced: A verdict having been found for the Plaintiff, the Court refused to set it aside, holding that this proof was sufficient.

THIS action against the sheriff of *Essex* for an escape was tried before *Wood* B., at the last *Essex* assizes, when the Defendant was connected with the officer by whom the escape was permitted, by a witness who produced the writ, and said he belonged to the sheriff's office; that the writ came to the office from the Plaintiff's agent, marked with the bailiff's name, and that he (the witness) again indorsed the bailiff's name on it. The writ produced bore the two indorsements. A verdict having been found for the Plaintiff,

Taddy Serjt., in the last term, had obtained a rule *nisi* to set aside this verdict and enter a verdict for the Defendant, on the ground that the sheriff could only be connected with the execution of the writ in question, by shewing that he had authorised the bailiff who put it in force, (*Hill* v. *Sheriff of Middlesex*(a)), and that in order to shew such authority, the officer ought to have been called, or his warrant produced.

Pell Serjt., *contrà*, contended that such authority was sufficiently shewn, by the circumstance of the writ having been seen in the sheriff's office with the bailiff's name on it.

Taddy having been heard in reply,

(a) 7 *Taunt.* 8.

The

The *Court* thought the sheriff's authority sufficiently proved; and, having referred to *Fermor* v. *Philips* (*a*), discharged the rule.

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Rule discharged.

(*a*) The Reporters have procured the following note of this case from a Gentleman at the bar.

FERMOR *v.* PHILIPS, Esq., Sheriff of OXFORDSHIRE.

In an action for an escape, the writ in the former action being produced bearing an indorsement purporting to record the sheriff's delivery of a warrant to *B.*, and *B.*, on being called, stating that he had delivered the warrant to another, who did not produce it: Held, that it ought to have been left to the jury to say whether *B.* acted under the sheriff's authority.

ACTION for an escape, tried before *Burrough* J., *Middlesex* sittings after *Hilary* term, 1817.

On the writ in the former action (which was produced to connect the Defendant with his bailiff) were indorsed the words, "Warrant to *Bloxham*, 6th *November*, 1816." *Bloxham*, who was called, said he had delivered the warrant to a person who did not produce it. *Burrough* J. was of opinion that the indorsement on the writ was not sufficient to connect the sheriff with *Bloxham*, and the Plaintiff was nonsuited.

On a motion for a new trial in *Easter* term, 1817, this Court held that it ought to have been left to the jury to say whether *Bloxham* acted under the authority of the Defendant, the indorsement on the writ being *primâ facie* evidence that he did so act.

POCOCK and Another *v.* GEORGE Bishop of LINCOLN and Others.

July 11.

"I do give to my son *R.* the perpetual advowson of *H. B.* in *Leicestershire*, and my manor of *S.*, and all my lands in *Northamptonshire*:" Held, by three Judges (*Park* J. *dissentiente*), that this devise gave only an estate for life in the advowson to the son *R.*, though he, at the time of making the will, was incumbent of the living.

QUARE *impedit*. The Plaintiffs, by their declaration, claimed, through several mesne conveyances, the advowson of *Husbands Bosworth* under *Thomas Pearce*, heir of *Richard Pearce* (the father.) The

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plea stated, that *Richard Pearce* (the son) having been presented by his father on the 2d *September*, 1790, was incumbent of *Husbands Bosworth* at the time of a devise, bearing date the 20th *May*, 1795, by which devise *Richard Pearce* (the father) gave and disposed of all his worldly goods as follows: To his son *Thomas* the manor of *Flamstead*, and all his lands in the parish of *Radburn*, and all rents that should be due at his death: but if no child should be born in wedlock, then he gave the above to his son *Richard*; and if he should have no child born in wedlock, then he gave all his lands and estates in the counties of *Hertford* and *Middlesex* to his daughter, and her heirs: the will then contained the following words: "I do give to my son *Richard* the perpetual advowson of *Husbands Bosworth*, in *Leicestershire*, and my manor of *Stanwick*, and all my lands in *Northamptonshire*." Then followed a devise to his son *Zachary*, of all the devisor's freehold houses, and all his lease houses, at his death, that were no part of the trade; and, after other legacies, the devisor gave all his *South Sea* annuities to his son *Richard*, &c. The plea further stated, that *Richard* (the father) died on the 10th *January*, 1800, and that the son *Richard* took under the will an estate in fee in the advowson, and by will devised the advowson to the Defendants, their heirs and assigns, and that *Richard* the son died; whereupon the Defendants became seised, for which reason, &c." Special demurrer and joinder. The question was, whether the devise of the perpetual advowson of *Husbands Bosworth* to the son, *Richard Pearce*, as above set forth, gave an estate in fee to the said *Richard*.

The case was argued on a former day in this term, by *Bosanquet* Serjt. for the Plaintiffs, and *Vaughan* Serjt. for the Defendants.

Argument

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Argument for the Plaintiffs. *Richard* only took an estate for life in the advowson. Conveyances of advowson are subject to the same rules as conveyances of land, tithes, or common, *Co. Litt.* 4. *a.*, in which more than a life estate does not pass, unless words of inheritance are employed: but there is nothing in the word *advowson* itself which in a deed would pass a fee, and a will is construed in the same manner as a deed, unless some intention which such a mode of construction would defeat, plainly appears in the will. *Davis* v. *Kemp.* (*a*) *Wild's* case. (*b*) *Bale* v. *Coleman.* (*c*) No such intention appears on this will; as it has already been decided with respect to the lands and manors which are mentioned in the same sentence, *Doe, dem. Crutchfield,* v. *Pearce* (*d*); and the heir at law can only be disinherited by express words, *Denn* v. *Gaskin.* (*e*) It is clear that a devise of tithes, right of common, or any incorporeal hereditament, would not pass a fee, unless accompanied by words of inheritance, or words equivalent thereto. And so it must be if the devise were simply of an advowson. Here, indeed, a question is raised on the expression "perpetual advowson;" but the word *perpetual* joined to *advowson* is only a description (*f*) of the thing in which the devisor had an inheritance, not a description of his inheritance in the thing. An advowson is not styled perpetual, because the patron has *a fee* in it, but because the order of presentation is uninterrupted in one person: the patron may have a fee where he does not enjoy the perpetual right of presentation; as where the advowson has gone to parceners, and the several patrons have a fee in their alternate right of presentation. So, on the other hand, the pa-

(*a*) *Carter*, 5, 6.

(*b*) *Rep.* 16.

(*c*) 8 *Vin. Abr. Devise* D. *b. pl.* 7.

(*d*) 1 *Price*, 364.

(*e*) *Dougl.* 759. See 1 *Roberts on Wills*, 496. &c., where the cases on introductory words are collected.

(*f*) *Per Bayley* J., in *Doe* v. *Wood*, 1 *B. & A.* 523.

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tron may limit a perpetual advowson for a term of years, the effect of which will be to give the lessee the uninterrupted right of presentation during that term. The cases on the word *hereditament*, in principle, bear directly on this point. No word of itself seems more expressly to point to an inheritance. Yet a devise to *A.* of all hereditaments gives him only an estate for life. *Denn* v. *Mellor.* (*a*) *Doe* v. *Allen.* (*b*) If a devisor were to devise "his *fee* farm rents," without more words, only an estate for life would pass, *aliter* if he were to devise his rents in fee. In *Loveacres* v. *Blight* (*c*) the words, "freely to be possessed and enjoyed," were held to carry a fee, because the estate was charged with payments; but the Court of King's Bench held, that where there was no charge, only an estate for life passed. *Goodright, dem. Drewry,* v. *Barron.* (*d*) The same principle applied to reversions, appears in *Peiton* v. *Banks.* (*e*) It may be urged, that, as *Richard* was already incumbent, if he did not take a fee by the devise, he was not benefited by it; but being only incumbent, and not tenant for life of the advowson, he was enabled by this devise to vacate and present, and so, perhaps, to provide for a son.

Argument for the Defendants. The principles laid down and cases adduced by the other side do not apply to devises of incorporeal hereditaments; more especially of such a nature as advowsons, which are a species of property *sui generis,* the incidents of which differ altogether from the incidents of other real property. Thus, where an advowson is mortgaged or goes to the assignee of a bankrupt, the mortgagee or assignee cannot present. *Mackenzie* v. *Robinson* (*f*), 3 *Cruise,* 39, 40. 42. In the

(*a*) 5 *T. R.* 58.
(*b*) 8 *T. R.* 503.
(*c*) *Cowp.* 352.
(*d*) 11 *East,* 220.
(*e*) 1 *Vern.* 65.
(*f*) 3 *Atk.* 559. And see 1 *Burn's Eccl. Law,* 4th ed. p. 125.

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writ of right of advowsons, the thing is demanded by the name of advowson, and no technical words of inheritance are introduced. *Registr. Brevium*, 29. *b. Fitzherb.* 30. According to *Johnson* and *Cowel*, the meaning of advowson is *jus patronatûs*; and *jus patronatûs* is the right of presenting whenever a vacancy occurs, that is, *in perpetuum.* Any thing short of an advowson is only a presentation. A devise of *hereditaments* will pass an advowson. (*a*) According to *Coke* (*b*), who refers to *Bracton* and *Fleta*, advowson imports the whole interest. Here, too, is the term *perpetual* affixed, which can only mean an interest *in perpetuum. Robinson* v. *Robinson* (*c*); and, according to *Littleton* (*d*), a devise *habendum in perpetuum* will carry a fee. At all events, it was the devisor's intention to provide for his family, by the dispositions of his will; an intention which ought to prevail in the construction of it, and which cannot be satisfied, but by giving *Richard* a fee in the advowson.

Cur. adv. vult.

And now, there being a difference of opinion on the Bench, the Judges delivered their opinions *seriatim.*

RICHARDSON J. The question upon this record is, whether by the devise in the will of the testator, *Richard Pearce*, to his son *Richard*, of the perpetual advowson of *Husbands Bosworth* in *Leicestershire*, an estate in fee in the advowson, or only an estate for life passed to *Richard Pearce* the son. If the fee passed, then the Defendants, as the devisees of *Richard Pearce*, the son, are entitled to the advowson: if an estate for life only passed, then the reversion of the advowson descended

(*a*) *Dyer*, 323.
(*b*) *Co. Litt.* 17. *b.* 119. *a.*
(*c*) 1 *Burr.* 38.
(*d*) *s.* 586.

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to *Thomas Pearce*, as the eldest son and heir of the testator, and consequently the Plaintiffs, as claiming under *Thomas Pearce*, are now entitled.

I am of opinion that, by this devise, an estate for life only in the advowson passed to *Richard Pearce*, the son.

The simple question is, whether the words "perpetual advowson" are descriptive of the thing devised, or of the testator's interest in that thing. I think that they are descriptive only of the thing devised.

It has been argued, that the word advowson imports a perpetual right to present, and would alone pass a fee: and that it is used by the testator in this extended sense, is said to appear the more clearly in this case by the epithet "perpetual." The latter part of this argument appears to me, to be very much weakened by the former; for, if the word advowson in itself imports any perpetuity of right, then the addition of the epithet "perpetual," only expresses what would otherwise have been implied, and carries the sense no farther.

The fact, I think, is, that "advowson," or "perpetual advowson," import the same thing; both denoting a right to present, not confined to one, or to any definite number of presentations, but to be exercised as often as a vacancy occurs. Such I conceive to be the meaning of the term "advowson," or "perpetual advowson:" but this does not prevent that description of property, like every other description of lands, tenements, and hereditaments, from being carved out into an estate for term of years, for life, in tail or in fee; nor does it exempt it from the rule of construction common to all grants of real property, whether in deeds or in wills, namely, that by a grant of the thing without more, an estate for life only will pass. The authority of Lord *Coke* in his comment on the 1st section of *Littleton* is express on this subject, where,

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Littleton having laid down the rule as applicable to lands, Lord *Coke* observes, that *Littleton*, in that and other places, putteth lands but as an example; for that his rule extendeth to signiories, rents, *advowsons*, commons, estovers, and other hereditaments of what kind or nature soever. (*a*)

The only difference in this respect between deeds and wills is, that, in the former, technical words are necessary to pass an estate of inheritance; in the latter, equivalent words, that is, any words importing such an intention will suffice. But equivalent words are as necessary to pass the inheritance in a will, as technical words are in a deed: and I find no such equivalent words in the will.

The testator here, after giving all his lands and *estates* in the county of *Hertford* and *Middlesex*, to his daughter and *her heirs*, (using proper words to convey the inheritance when such was his intention) proceeds thus: "I do give to my son *Richard*, the perpetual advowson of *Husband's Bosworth*, in *Leicestershire*, and my manor of *Stanwick*, and all my lands in *Northamptonshire*."

It has been properly decided by the Court of Exchequer, that, by this devise, the lands passed only for life: and it would be extraordinary, if, by the same words of devise, applied in the same sentence to two sorts of property, the one should pass for life and the other in fee.

It has been said, that a devise of hereditaments will pass an advowson, which is true; but it is equally true that, by such a devise without more, an estate for life only will pass. This rule as applied to *land*, is settled by *Denn*, *dem*. *Moore*, v. *Mellor*; and applies equally to every description of real property, whether

(*a*) Co. Lit. 4.

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corporeal or incorporeal, whether capable of a constant enjoyment, like lands or houses, or only of an occasional one, like tithes or the patronage of churches or offices, which can only be exercised when an occasion or vacancy occurs. If a man, having lands, tithes, and advowsons in fee, should devise all his hereditaments to *I. S.* without more, it is clear that the land would pass for life only; and so also would the tithes and advowsons, though the devisee might die before any tithes should accrue, or any vacancy occur.

One other circumstance remains to be noticed; namely, that, at the time of making this will, the testator's son *Richard* was actually the incumbent of the benefice; whence it is argued that, unless the fee passed, the devisee could derive no benefit from the devise, and thence an intention is inferred to give the fee. But this is not so; for although it is true, that the devisee could not have sold his interest in the advowson, and then have vacated the benefice by resignation in favour of the purchaser; yet he was empowered by this devise, with the consent of the ordinary, to vacate in favour of a child, a relation, or a friend, for whom he might wish to make provision, and it appears that he actually did so: or a vacancy might have arisen without resignation by the incumbent's attaining to other ecclesiastical preferment. The devise, therefore, though only for life, had an operation by giving to the devisee a very different interest in the advowson from that which he had before, as the mere incumbent: and this is sufficient to satisfy the words of this devise.

For these reasons, I am of opinion, that judgment must be given for the Plaintiffs.

BURROUGH J. The question is, whether the devisor has by his will devised to his son *Richard* the perpetual advowson of *Husbands Bosworth* in fee or for life.

[Here

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[Here the learned Judge stated the devises in the will as set forth in the pleadings.] This will, as to the devise to the son *Richard* of the manor of *Stanwick* and all the devisor's lands in *Northamptonshire*, has been under the consideration of the Court of Exchequer. It appears that that Court was of opinion, that *Richard* took only an estate for life in the lands in *Northamptonshire*: the Court thought that there were no auxiliary words in the will, either in the introductory part or elsewhere, to give the words of devise of all the devisor's lands in *Northamptonshire* any greater effect than a devise of an estate for life to *Richard*. It appeared to the Court not to be necessary to say in that case what interest *Richard* took in the advowson; but it is obvious that, if *Richard* took a fee in the advowson, it might have been urged with great force, that he took a fee by the devise of the lands immediately following. The Lord Chief Baron, however, said (*a*), that the words " perpetual advowson" did not carry it further than " advowson:" any thing short of advowson, he said, is the next presentation. Strongly confirmatory of this is what is said by Mr. Justice *Bayley*, in *Doe, dem. Wood*, v. *Wood.* (*b*) In that case the devise was to *Henry Wood* of " all the rest of the devisor's farms, lands, tenements, and buildings, and the perpetual advowson of *Rusper* rectory, to be kept in the family and name of the *Woods* as long as can be." The Court held, in that case, that the words " to be kept, &c." gave a fee, but Mr. Justice *Bayley* said, " the former part of the devise of all his farms, lands, tenements, and buildings, would not give more than an estate for life. Nor would the words " perpetual advowson" carry it any farther; for the word " perpetual" applies only to the description of the property, and not

(*a*) 1 *Price*, 353. (*b*) 1 *B. & A.* 518.

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to the quantum of interest, which the devisee takes in it." Nothing is said to the contrary of this, either by Lord *Ellenborough*, Mr. Justice *Abbott*, or Mr. Justice *Holroyd*.

This brings it to the dry question of, what is the effect of the words of devise of the perpetual advowson in this will? In support of the idea of its carrying a fee, it has been stated, that, in a writ of right of advowson, it is demanded in the writ by the name of "advowson." When the purpose of the writ and of the count in the writ are considered, it seems to me to prove the contrary. By the writ the demandant demands the thing as "manor," "messuage," "land," "advowson," &c. without adverting to the extent of his interest; the count on the writ of right invariably states a seisin in fee in the demandant, or some other under whom he derives his title in the thing sought to be recovered, after stating the writ which demands the thing in general; and as *Co. Litt.* (*a*) "of an advowson and such like he shall plead" what is in the count, "that he is seised *de advocatione ut de feodo et jure*." An advowson being an incorporeal hereditament, the demandant cannot say he was seised *de feodo et jure*; but he must say, *ut de feodo et jure*, a similitudinary expression. In 1 *Gibson's Cod.* 758. *s.* 5. it is said, that "an advowson, being an inheritance incorporeal, and not lying in manual occupation, cannot pass by livery, but may be granted by deed or by will, either for the inheritance, or for the right of one or more turns, or for as many as shall happen within a time limited." It has been often said of the author of this book, that he was a good common lawyer. I think it must be inferred, that he meant that a mere devise of an advowson would not pass the incorporeal inheritance in it. In 2 *Blackst. Com.* (*b*) it is said, that an advowson is an incorporeal

(*a*) 17. *b*. (*b*) *Book* 2. *ch*. 3. 1.

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hereditament. So says Bishop *Gibson* in substance. Now a devise of devisor's hereditaments will pass an advowson, *Co. Litt.* (*a*), where it is said, that "hereditament" is the largest word of all in that kind; for whatsoever may be inherited is an hereditament, be it corporeal or incorporeal, real or personal, or mixt."

In *Doe, dem. Small and Others,* v. *Allen* (*b*), Lord *Kenyon* says, "The next point arises on the word 'hereditaments;' and I am astonished that any doubt should have been entertained about that. It is not so strong a word as 'tenement;' it is merely a description of the thing itself, and not of the quality of it." His lordship was of the same opinion in *Doe, dem. Palmer* v. *Richards.* (*c*) What he says as to the doubt arose from what was said in that case by Mr. Justice *Ashurst* and Mr. Justice *Grose.* Lord *Kenyon* was fortified in his opinion by what was said by Lord Chief Justice *Trevor*, in *Hopewell* v. *Ackland.* (*d*) Thus then the word "hereditament" in a devise will pass an advowson, but it will not, without more, pass a fee: could it then pass a fee in an advowson, within which it is comprehended? No — why is this? because it is a description of the thing, and not of the quality of the thing; this accords entirely with what Mr. Justice *Bayley* says in *Doe, dem. Wood,* v. *Wood.*

It is a settled rule in the construction of wills, that there must either be words of limitation to pass a fee, or expressions having the same effect. Words denoting the entire interest in the thing devised, will pass a fee as well as the word estate, or a charge on the thing by which the devisee may be a loser, if a fee does not pass. This was the case (amongst many others) of *Doe,*

(*a*) 6. *a.*
(*b*) 8 *T. R.* 503.
(*c*) 3 *T. R.* 356.
(*d*) *Mosely, Rep.* 240. 1 *Salk.* 230.

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dem. Palmer, v. *Richards*. There the words were of a devise of "all the rest, residue, and remainder of my messuages, lands, tenements, hereditaments, goods, chattels, and personal estate whatsoever, my legacies and funeral expences being thereout paid."

The frame of this will does not require that a fee should pass. The circumstance that the devisee was a son and incumbent at the time, does not require it; for a benefit did pass, and he has, in fact, had an opportunity of receiving that benefit by presenting another on his own resignation.

It appears that, in one part of the will, the devisor has used words of limitation in the devise to the daughter and her heirs.

The heir at law is not to be disinherited but by words of limitation, words tantamount, or necessary implication, to be collected from the whole of the will.

In this case, in my judgment, there is no ground for holding that *Richard*, the son, took more than an estate for life. I therefore think the judgment must be for the Plaintiffs.

Park J. Though I have the misfortune to differ from my two learned Brothers, who have preceded, and I believe, also, from the Lord Chief Justice, who is to follow me in the argument; yet I shall not feel it necessary in stating the grounds of my opinion to do so at any great length.

The words of the will of *Richard Pearce*, who died in the year 1800, have been so often stated, that I shall not think it my duty to repeat them, the only question being, whether the devise of the perpetual advowson of the church of *Husbands Bosworth* to his son *Richard* be a devise in fee or for life only.

In my view of this case, it is not necessary to discuss the exact meaning of the word "advowson;" whether

ther *ex vi termini*, it would, in a deed, carry the whole interest in fee; and whether, if less than the whole is intended to be conveyed (as less than the whole clearly may be carved out by the person seised of the whole), there should not be words of restriction, such as in tail, for life, for years, or the next, or the next two avoidances, indicative of that intention.

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If one looked to the origin of advowsons, one would have supposed that this was so: because according to Lord *Coke* (*a*), "advowson is so called, because *the right of presenting to* the church was first gained by such as were founders, benefactors, or maintainers of the church." — "They were, also, called *patroni*, and, thereupon, the advowson is called *jus patronatûs*. And in one word, advowson of a church is the right of presentation or collation to the church."

The *jus patronatûs*, according to the explanation here given, is the same as *advowson*; and, surely, the *jus patronatûs*, unless it has restrictive words, one should have supposed, as an unlettered person, embraced the whole, and could never mean the next avoidance: and, in common parlance, I am sure it does so.

But, as I said before, it is not necessary for me to give an opinion upon the question what that word must be taken to mean in a deed, where no words of inheritance are added. I shall assume that Lord *Coke* is right when, in page 4. *a*. of the first Institute, he says, that *advowsons* are one of those things, which must have words of inheritance added to them, according to the first section of *Littleton*, to make them an estate in fee-simple. But he is here speaking only, and *Littleton* before him, is only speaking of the necessity of words of inheritance in his *purchase*, as *Littleton* calls it, that is in *his deed*.

(*a*) *Co. Litt.* 119. *b.*

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I am also willing to admit, as not affecting my view of the argument, that, if words of inheritance are omitted in a deed, the word "perpetual" prefixed to "*advowson*" will not carry it further, for that may not be its import in legal acceptance; and, in this respect, Lord Chief Baron *Thompson* must be understood, when he says any thing short of advowson is the next presentation, a phrase, however, which, by those who contend that the word advowson carries the whole, may be supposed to favour their interpretation. Mr. Justice *Bayley*, also, supposes the word "perpetual" to be descriptive of the property, and not to be applicable to the *quantum* of interest which the devisee takes in it: a proposition, however, to which, in its extent, and as used by a testator in disposing of his property, I cannot, with all due deference to my learned Brother, who is made by the reporter so to express himself, fully subscribe.

Having made these admissions on my part, it must now be admitted to me, on the other, that many words, which will not carry a fee in a deed, will carry it in a will, if the words used in the devise can be shewn to be sufficient to indicate that intention in the testator.

In the case last referred to, of *Doe dem. Wood* v. *Wood*, the words "perpetual advowson" were held to carry a fee, such being clearly the intention of the testator. Let me not be supposed to quote this case, for the purpose of saying, that any words, to be found in this will of Mr. *Pearce*, are half so strong as the words used in the case of *Doe* v. *Wood*. I only quote it to show the principle, that, under circumstances, "advowson" in a will will pass the fee.

As little, I presume, can it be contended, (although this devise of the advowson is found in the same sentence with a devise of "all his lands in *Northamptonshire*," which latter part of the sentence has been held not to carry the fee in those lands,) that, therefore, this

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this devise of the advowson cannot confer the absolute interest on the devisee. Lord Chief Baron *Thompson* has expressly declared the contrary in this very case; for his Lordship, in delivering the judgment of the Court, says, "even admitting that the words were sufficient for passing a fee, as to this part of the devise respecting the advowson, we are of opinion, that it would not necessarily follow therefrom that a fee also passed in the premises for which the present ejectment is brought."

His Lordship founded himself on the case of *Paice* v. *The Archbishop of Canterbury* (a), in which the Lord Chancellor said, "that where a man devised his farm and lands at *Royston* to *Henry Taylor*, his heirs and assigns for ever, and also I give and bequeath to the said *Henry Taylor* my farm and manor of *Eythorne Court*," the devisee only took an estate for life in the latter devise: although, in the same sentence, he took an estate in fee; and although the two bequests were united by the words "and also."

Then it seems to me, that we are to look at the whole of this case together on the face of the will, and on the facts admitted by the pleadings. The introductory words of the will show that the devisor meant to dispose of every thing, and that whatever he devised, he meant to give absolutely: "I, *Richard Pearce*, do give and dispose of *all my* worldly goods it has pleased God to bless me with as follows." Now I admit that very strong introductory words have never been construed *by themselves* to carry a fee, and that the importance of the introductory clause, as manifesting an intention of complete and ultimate disposition, has been gradually declining in our courts: yet both Lord *Kenyon* and Lord *Ellenborough* admit them to have some weight where the intention of the testator is doubtful, and where there are

(a) 14 *Ves.* 364.

other

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other words in the will to carry the intention into effect. Lord *Ellenborough*, in *Doe dem. Bates* v. *Clayton* (*a*), says, "This construction may be considered as in a degree aided by the introductory words of the will respecting his worldly and temporal estate, which are allowed to have *some* weight in cases where the intent of the testator is doubtful, and where there are other words in the will to carry his intent into effect." And Lord *Kenyon* had said, that though such words would not of themselves have carried the fee, yet they will have *some* effect in the construction of the subsequent devises.

In *Doe, Lessee of Wall*, v. *Longlands* (*b*), Lord *Ellenborough* says, "Very little inference of intention can be drawn from mere formal words of introduction: *though we certainly find them in some cases called in aid* to show that a man did not mean to die intestate as to any part of his property:" and his Lordship adds, what I admit weakens the force of his preceding observations, "and the making a will at all may also be used as affording such an inference."

However, I think no man can doubt, that *Richard Pearce* did not mean to die intestate, and that is all the benefit which I claim for my argument, from these words. Then he gives "to my son *Richard the perpetual advowson* of *Husbands Bosworth*, in *Liecestershire*." Now, though in a deed I have admitted that "perpetual" prefixed will carry "advowson" no further than the word itself will do, yet, when the expression is used in a will made by a man ignorant of the law, (those words in common parlance being constantly used to express the absolute interest in the *jus patronatûs*,) it surely may be considered, as showing the testator's intention to give every thing he had in this property, and that he contemplated

(*a*) 8 *East*, 141. (*b*) 14 *East*, 370.

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a *perpetuity*, as if he had said, "meaning to dispose of all my worldly goods, I give the *perpetual advowson*, now belonging to me, to my son *Richard*, that is, all that I have in that advowson."

The words are, "the perpetual advowson;" that is, the advowson which is an entire or absolute advowson.

From the will it appears that he was providing for all his children much more than for their lives: but, except the *South Sea* annuities, if he gives only an estate for life in this advowson and manor of *Stanwick*, and all lands in *Northamptonshire*, (in which latter place it has been decided the devisee took only for life,) *Richard* the son would then have no provision beyond his life, as his other brothers and sister have.

But the strong point of this case, as it strikes me, and what I cannot answer satisfactorily to my own mind in any other way than by giving *Richard* the son this advowson in fee, is the fact stated in, and admitted by these pleadings. The will in question was made in the year 1795, devising this advowson (as it is contended for *life* only) to a man who had been in possession of it five years before, viz. in 1790, and was deriving every *beneficial fruit* from it, which he could enjoy; and which he must continue to derive, as long as he lived, unless he resigned it, or was promoted to some station incompatible with it, which latter cases are the only possible ones in which he could have even the power of benefiting a friend. I cannot conceive it possible that the father should devise to him that which he then, and for five years, had beneficially enjoyed, and which, but for his own voluntary act, he must continue to enjoy during his life; and, therefore, could never exercise his *jus patronatûs*. I cannot conceive that the father could have intended to devise him nothing at all, or worse than nothing. Nor can I suppose the father to have acted upon the remote contingency of his son's preferment:

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remote to him it was, for (if it existed before this clergyman died) it never existed in his father's life-time. The son was incumbent five years before the will, and the father lived five years after making it, till 1800, and yet never saw his son any thing but rector of *Husbands Bosworth*. But, even if he should vacate on promotion, the father gave him nothing but what I admit to be a great moral pleasure, that of advancing a friend; for he could not sell a turn or avoidance; which turn or avoidance, when he sold it, he knows he should himself immediately create.

But, if he resigned, it is said, he might present; — true, but then he would gain a loss: for then, to exercise his right of patronage, he must resign an income of 300*l*., 400*l*., or 500*l*. a-year, or whatever the amount might be. If ill-health, or any cause of that nature, should oblige him to resign, I admit it to be a satisfaction to present a friend; but it would not then be a gift of pecuniary value. Whereas if it was an advowson in *fee* or *perpetual*, it was a provision for this gentleman and his family, by enabling him to carve out a provision for one of his sons, or, by selling the advowson, which he would then have a right to do; and thus, by giving him an inheritance, putting him on a footing with his brothers and sister.

Under these circumstances, I am of opinion *Richard Pearce* took this advowson in fee under his father's will; and, consequently, that there ought, in my view of the case, to be judgment for the Defendants.

DALLAS C. J. I am of opinion that, by the words in this will, an estate for life only passes. It is admitted that in a deed this would be clear; nor is it contended, that the addition of "perpetual" would carry it further than the word "advowson" only. To this also the opinions given both in the Exchequer and in the

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the King's Bench, directly go. What, then, is there in a will to justify a different construction, and to convert into a fee that which in a deed would be clearly but an estate for life? In general, the rule of construction must be the same, unless in the will itself there be found something to vary it. And this narrows the case to the consideration of the particular will, and to the effect of the words to be found in it, having reference to the subject-matter.

And, here, the argument must turn upon the rule applicable to all cases of this description, viz. the question of intention as to be collected from the whole will. Now, as to the question of intention, the leading rule laid down in the books is this, that, to carry the inheritance, the intention must be disclosed, either by express words or clear implication. A doubtful intent will not be sufficient to disinherit the heir at law. I am of opinion, that, in this case, a clear intent to pass an estate of inheritance does not appear; and, therefore, that, even if the intent were doubtful, such estate would not pass. One leading rule to be found in the books is, that the construction of wills shall be made according to the rules of the common law in respect to estates limited or created by deed, unless there be something clearly to be collected from the will itself, disclosing a different intention. And this is stated and frequently referred to as a safe and fundamental rule. In one of the reported cases, it is laid down in these terms: "The intent which ought to govern must be a certain and manifest intent, and not an arbitrary one; it must be according as it appears upon the will, and according to the known rules of law; it is not to be left to a latitude, and as it may be guessed at."

This being premised, I come to the will in question. And, first, it is agreed, that no aid can be derived from the

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the generality of the introductory words, for they would equally apply to lands, and the lands are devised generally, and in these it is admitted, that the devisee takes an estate for life only. It is, also, admitted that no aid is to be derived from the probability of the testator not meaning to die intestate. Generally speaking, this would more or less apply to every case of partial intestacy; and, no doubt, in many of such cases, the probability is, that the effect given to the will is contrary to the intent of the testator. In the nature of things, a man is generally glad to give what he means to bestow by express words, and not (if I may so express it) sullenly to leave it to the silent operation of the law. If not in a majority of wills, yet, certainly in a great number, the construction is contrary to the probable intent. "Most people," said Lord *Mansfield*, "when they give their land, probably meant to give it absolutely, as they would give personal property, a horse, or a piece of plate." And to this observation, adopting it himself, Lord *Kenyon* has more than once expressly referred. On what special grounds then does this case stand? A distinction was attempted at the bar, from the nature of the property itself. An advowson was said to be an incorporeal hereditament, differing from land; and certainly it does, in itself, differ from land; but it does not differ from land as to the rules of law, by which it is to pass in a will or in a deed. As to a deed, I have already said, it stands on the same footing, and this is agreed. Now, taken as an incorporeal hereditament, what is the effect? It operates as a description of the thing, not denoting the quantity of interest given, and, therefore, ranges under the general rule. In *Hopewell* v. *Ackland*, Lord *Trevor* said, "the word 'hereditament' cannot be taken to denote the measure or quantity of estate, because it has a proper meaning and extends to annuities, advowsons in gross, &c. which are not comprised

prised by the words lands and tenements."(*a*) And, in *Canning* v. *Canning* (*b*), it was said by the Master of the Rolls, that the law was settled in the case of *Hopewell* v. *Ackland*, that a fee will not pass by the word hereditament. 1821. POCOCK v. The Bishop of LINCOLN.

An advowson, therefore, as an incorporeal hereditament, will no more pass the fee by a devise of it as advowson in a will, than by a grant of it in a deed. "Advowson," or "perpetual advowson," apply, therefore, as descriptive of the thing devised, not as denoting the quantity of interest which the devisee is to take. And, whether it be in a deed or in a will, there is no difference whatever; the terms themselves alone being considered. The remaining part only is that which weighs with my Brother *Park*; and, without going in detail into this part of the subject, after what he has already said, but referring to the observations of my Brothers *Park* and *Richardson*, I will only say that, even allowing this view of the subject to be entitled to weight, still it only involves, as it appears to me, matter of conjecture more or less doubtful; and, at all events, not denoting that clear and manifest intent, which, on the known and admitted principles of law, can alone give to words in a will a different construction from what they would receive in a deed.

The rule, therefore, I think, must prevail, independently of other grounds, namely, that construction of wills shall be made according to estates at common law by deed, unless there be something in the intent of the will appearing to the contrary. Into this, therefore, the subject seems to me to resolve itself. And, even if I could admit it to be in a degree probable, that the testator might intend to give an estate in fee, I must apply the principle, so often applied in cases of this description, "*Voluit sed non dixit;*" and, not having said so, I cannot, on any conjecture of my own, say so for him.

(*a*) 1 *Salk.* 239. (*b*) *Mosely, Rep.* 242.

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him. I beg, however, to be considered as not forming any conjecture as to probability one way or the other, but as deciding the case, as far as my opinion goes, on the principles stated, and by which, I think, it ought to be governed.

Judgment for the Plaintiffs.

July 11.

COATES and Others *v.* PERRY and Others.

A conveyance by debtors to trustees, in trust to sell, and with the proceeds to discharge, *first*, debts due to the trustees, *then* debts due to other creditors, with a resulting trust for the original debtors, does not require an *ad valorem* stamp, as upon a sale or mortgage under 55 *Geo.* 3. *c.* 184. By three Judges (*Dallas* C.J. *absente.*)

AT the trial of this cause, before *Park* J., at the last *Hereford* assizes, a deed of which the following is an abstract, was tendered in evidence, stamped with a common deed-stamp, and it was contended for the Defendants, that it should have been stamped with an *ad valorem* stamp, under the 55 *Geo.* 3. (*a*) *Park* J. was of opinion that the deed was duly stamped, and the jury found a verdict for the Plaintiffs.

By indenture, dated the 24th *March*, 1820, made between *Ann Preece*, widow, *Edward*, *Thomas*, *Charles*, and *George Preece*, of the one part, and *Mark Poyntz Matthews*, *Benjamin Coates*, and *Thomas White*, creditors and trustees named on behalf of themselves and other the creditors of the said *Ann*, *Edward*, *Thomas*, *Charles*, and *George Preece*, of the other part; after reciting that *Ann*, *Edward*, *Thomas*, and *George Preece*, were indebted to the said *M. P. Matthews*, the said *B. Coates* and the said *T. White* respectively, in certain sums of money, making together the sum of 2,220*l.* 11*s.* 8*d.*, and to various other persons, in several sums of money, and had agreed to assign all their personal estate and effects to the said *M. P. Matthews*, *B. Coates*, and *T. White*, in trust, to pay and satisfy the same in the manner thereinafter expressed, in consideration of 10*s.* a-piece, they

(*a*) *c.* 184. *sched. part* 1.

the

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the said *A.*, *E.*, *T.*, and *G* *Preece*, granted, bargained, sold, assigned, transferred, and set over unto the said *M. P. M.*, *B. C.*, and *T. W.*, "All that the live stock, and the crops of corn, grass, hay, straw, hops, and fruit, now growing or to grow; implements of husbandry; household goods, and furniture, plate, linen, and china; book and other debts, bonds, notes, bills, and securities; and all and singular other the personal estate, property, and effects of what nature or kind soever or wheresoever, of or belonging, or due or owing to them the said *A.*, *E.*, *T.*, *C.*, and *G. Preece*, or any or either of them," to hold to them the said *M. P. M.*, *B. C.*, and *T. W.*, their executors, administrators, and assigns, wholly and absolutely, as and for their own proper goods, chattels, and effects; upon trust, that the said trustees should, without any further consent, authority, or concurrence of the said *Preeces*, or their executors or administrators, immediately upon the execution of the said deed, or at any time or times thereafter, when and as they should think fit, sell and dispose of, either by private contract or public auction, either together or in separate parcels, and at one time or different times, as they should think best, all and singular the said crops, goods, and effects, and get in and receive the debts and monies, and other the personal estate and effects thereinbefore assigned, and should stand possessed of the money produced by such sale, and of the personal estate, upon trust, in the first place, to reimburse themselves respectively all expences incurred in preparing and executing the said deed or relation thereto, and then in payment and satisfaction of all legal rents, taxes, and duties, and salaries and wages to clerks, servants, and agents, and also all expenses of the sale of the trust, and upon trust to pay and satisfy the said sum of 2220*l.* 11*s.* 8*d.*, with interest, after the rate of 5*l.* *per cent. per annum*, from the date thereof, and to pay and apply all the residue of the said monies, in payment and

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satisfaction of the several other debts and demands owing by the said *Preeces* to such of his, her, or their respective creditors, or their respective executors, administrators, partners, or assigns, rateable and in proportion to the amount of the debts owing to them respectively, without any priority or preference of any one or more of them to the other or others of them; and after such payment, then, in trust, to pay the surplus to the said *Preeces*, to and for his and their own use and benefit. Power to the trustees, out of the first or any other monies which might come to their hands, to satisfy any execution or extent against the person or property of the said *Preeces*. The deed also contained the usual power of attorney, to enable the trustees to get in the personalty, and a covenant on the part of the *Preeces*, to manage, work, and cultivate the lands, grounds, and premises in their possession or occupation, in the best manner, and sow and plant the same with proper corn, seeds, or grain, which might be deemed most adviseable for the benefit of the creditors, for and upon the trusts expressed in the deed.

Lens Serjeant having, on a former day, obtained a rule *nisi* to set aside the verdict, and enter a nonsuit on the grounds urged at the trial,

Vaughan Serjt, who subsequently shewed cause against the rule, argued, that a stamp, as on a sale, could not be necessary, because the deed was not made upon an actual sale of the property, but only conveyed it to trustees, for the purposes of sale, and that a mortgage stamp would be inapplicable; because, though the conveyance was for the payment of the trustees in the first instance, yet all the creditors were ultimately to obtain payment, so that the deed fell within the exception at the end of the clause, under the word MORTGAGE, in 55 *Geo.* 3. *c.* 184., Sched. part 1.

Lens,

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Lens, in support of the rule, urged, that the deed was substantially a transfer upon sale, and, therefore, ought to have had an *ad valorem* stamp; or, if it was considered in the nature of a mortgage, that it did not fall within the exception in the statute, because it was for the benefit of the trustees, and not of the creditors generally, who would be left unpaid, if the estate upon sale did not produce sufficient to satisfy the trustees.

Cur. adv. vult.

And now,

PARK J. delivered the judgment of the Court.— This case came before the court upon a motion to enter a nonsuit. The case was tried before me at the last assizes for the county of *Hereford*, and a verdict was found for the Plaintiffs, with my approbation. One of the questions before me at the assizes was, and the only one now before the Court upon the motion is, whether the deed under which the Plaintiffs claim the property, was duly stamped.

This case was argued the other day in the absence of the Lord Chief Justice; and my Brothers and myself postponed the giving our opinions at the time of the argument, not from any doubt we entertained, but because a question of the same nature in the same cause, the parties only being reversed, being depending in the Court of King's Bench, we wished to come to the same conclusion with that Court. I have not heard whether that cause has been before the Court; and, therefore, we can no longer delay our judgment.

This question depends on the 55 *Geo.* 3. *c.* 184. *Sched. part* 1., and it is admitted, that, if the deed is to be considered as a common deed, under the description in the schedule of the statute of "a deed of any kind whatever, not otherwise charged in this schedule, nor

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expressly exempted from all stamp duty" (*a*), it has been duly stamped. But it is said, it must have an *ad valorem* stamp, for that this case is to be brought under the words in the schedule, "Conveyance, whether grant, disposition, lease, assignment, transfer, release, renunciation of any other kind or description whatsoever, *upon the sale* of any lands, tenements, rents, annuities, or other property, real or personal, heritable or moveable, or of any right, title, interest, or claim in, to, out of, or upon any lands, tenements, rents, annuities, or other property, that is to say, for and in respect of the principal or only deed, instrument, or writing, whereby the lands or other things sold shall be granted, leased, assigned, transferred, released, renounced, or otherwise conveyed to or vested in *the purchaser* or *purchasers*." But we are of opinion that the deed in question does not fall under this section of the act; for the words which I have emphatically mentioned, clearly shew this clause to have been intended to operate upon actual sales between vendor and vendee. Now, the deed in question is no sale of the property to *Coates* and others, it is a deed, appointing them trustees to sell and to distribute the produce of the money in the manner therein mentioned; and the duty required to be paid in all the cases under this word *conveyance* in the statute, is, "when the purchase or consideration money therein or thereupon *expressed* shall amount to, &c.," evidently shewing that what was meant by the legislature was an immediate money consideration *expressed*. (*b*) Now here, the consideration expressed is 10*s.*; but, then, it is argued to be a conveyance (under the word *mortgage* in the schedule) liable to an *ad valorem* duty, under these words, "any

(*a*) *Sched. part* 1. tit. *Deed.*

(*b*) And see in *Sched. part* 1. tit. *Conveyance*, *p.* 514. of *Raithby*'s edit., the following "Note. — The purchase or consideration money is to be truly *expressed* and set forth in words at length, in or upon every such principal or only deed, or instrument of conveyance."

convey-

conveyance of any lands, estate, or property whatsoever, in trust, to be sold, or otherwise converted into money, which shall be intended only as a security, and shall be redeemable before the sale or other disposal thereof, either by express stipulation or otherwise;" and, if the clause had stopped where the words printed in *italics* begin, this deed would have fallen within that description: but the clause goes on, "*except where such conveyance shall be made for the benefit of creditors generally.*" If this deed was so made, then it falls within the exception, and the stamp imposed upon it was quite sufficient; we must look at the deed itself, for the purpose of ascertaining this. [Here the learned Judge read the trusts of the deed.] Now it is very true, that the primary object was the payment of the trustees, but there was also a trust, after they were satisfied, to pay all the other creditors, with a resulting trust for the original debtors. The payment of the creditors generally was therefore in contemplation at the time; that was the object; and we therefore think this case falls within the exception which I have last read.

To hold the contrary would be a very harsh construction, and would very much injure all insolvent estates, where deeds of this sort are deemed adviseable, as they would have a double *ad valorem* duty to pay before any benefit could be derived to the creditors from the property; *one*, immediately upon the original conveyance from the debtor, and the other, as soon as the trustee sold, for the purpose of executing the trust, when there is no doubt, the *ad valorem* duty must be duly paid.

Every deed of this sort has its own peculiar properties, depending upon the arrangements made in each particular case. Here, undoubtedly, the first object was the payment of the debts of the trustees; but the general object was the payment of the creditors generally;

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and we are therefore of opinion this rule ought to be discharged.

Rule discharged.

(IN THE EXCHEQUER CHAMBER.)

July 10.

BRETHERTON and Others *v.* WOOD.

In an action on the case in *B. R.* against ten Defendants, as proprietors of a coach, for injuries sustained by the Plaintiff, a passenger, in consequence of negligence in driving, whereby the coach was overset, the jury found a verdict against eight of the Defendants, and in favour of the other two; and judgment was entered accordingly. On error in *cam. scacch*, the judgment was affirmed.

ABRAHAM *Wood*, the Plaintiff below in this cause, complained of *Peter Bretherton, James Whittaker, Thomas Leary, William Jackson, John Daxon, William Lee, Mary Ribby, Ellen Bretherton, Abraham Dearden,* and *Elizabeth Dearden*, (the Defendants below) being in the custody, &c. of a plea of trespass on the case: For that, whereas before and at the time of committing the grievances thereinafter next mentioned, the said Defendants were proprietors of a certain stage-coach, for the carriage and conveyance of passengers for hire from *Bury*, in the county of *Lancaster*, to *Bolton*, in the same county, to wit, at, &c.; and being such proprietors of the said stage-coach, the said defendants, to wit, on, &c., at, &c., received the said Plaintiff, and the said Plaintiff became and was an outside passenger upon their said stage-coach, to be safely and securely carried and conveyed thereon from *Bury* aforesaid to *Bolton* aforesaid, for certain hire and reward to the said Defendants in that behalf; and, by reason thereof, the said Defendants ought safely and securely to have conveyed, or caused to be conveyed, the said Plaintiff on the said coach from *Bury* aforesaid to *Bolton* aforesaid; yet the said Defendants, not regarding their duty in this behalf, conducted and behaved themselves so carelessly, negligently,

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gently, and unskilfully in this behalf, that by and through the mere carelessness, negligence, unskilfulness, and default of themselves and their servants in that behalf, the said coach, afterwards, and whilst the same was carrying and conveying the said Plaintiff as aforesaid, and before the arrival thereof at *Bolton* aforesaid, to wit, on, &c., was overset and overturned, to wit, at, &c., by means whereof the said Plaintiff, then being thereupon, became and was greatly cut, &c. &c. Second count; and whereas also heretofore, to wit, on, &c., at, &c., the said Defendants being then and there proprietors of a certain other stage-coach, the said Defendants received the said Plaintiff, and the said Plaintiff, at the special instance and request of the said Defendants, became and was an outside passenger by the said last-mentioned stage-coach, to be safely and securely carried and conveyed thereby from *Bury* aforesaid to *Bolton* aforesaid, to wit, at, &c., by reason whereof the said Defendants ought safely and securely to have conveyed, or caused to be conveyed, the said Plaintiff on their said last-mentioned coach from *Bury* aforesaid to *Bolton* aforesaid, yet the said Defendants again, not regarding their duty in this behalf, conducted and behaved themselves so carelessly, negligently, and unskilfully in this behalf, that by and through the mere carelessness, negligence, unskilfulness, and default of themselves and their servants in that behalf, the said last-mentioned coach afterwards, and whilst the same was carrying and conveying the said Plaintiff as such outside passenger as aforesaid, to wit, on, &c., was overset and overturned, to wit, at, &c., by means whereof the said Plaintiff, then being thereupon, became and was greatly cut, &c. &c. Plea not guilty and issue thereon. At the trial at *Lancaster*, (Summer assizes, 1820) the jury found on this issue, that two of the Defendants below, *Mary Ribby* and *Ellen Bretherton*, were not guilty of the premises laid to their

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charge, and that the rest of the Defendants below were guilty thereof, and assessed the damages at 50*l.* On this finding, judgment was entered up in the *Michaelmas* term following for the Plaintiff below, against the Defendants below, who were found guilty, and for the two Defendants below, who were found not guilty.

The Defendants below, who were found guilty, having brought a writ of error in this court, assigned for errors, "that although, by the record aforesaid, it appears that the said *Abraham Wood* commenced and prosecuted his action in this behalf, and declared therein against all of them the said *Peter*, *James*, *Thomas*, *William Jackson*, *John*, *William Lee*, *Abraham Dearden*, and *Elizabeth*, jointly with one *Mary Ribby* and one *Ellen Bretherton*: Nevertheless it appears, in and by the said record, that the verdict was given severally; that is to say, that the said *Mary* and *Ellen* were not guilty of the premises laid to their charge; and that the said *Peter*, *James*, *Thomas*, *William Jackson*, *John*, *William Lee*, *Abraham Dearden*, and *Elizabeth*, were guilty of the premises laid to their charge, in manner and form as the said *Abraham Wood* hath within thereof complained against them; and that it appears, in and by the said record, that judgment thereon was given for the said *Abraham Wood* against the said *Peter*, *James*, *Thomas*, *William Jackson*, *John*, *William Lee*, *Abraham Dearden*, and *Elizabeth* only, and not against the said *Mary* and *Ellen*; but that judgment thereon was given for the said *Mary* and *Ellen*, against the said *Abraham Wood*; whereas, by the law of the land, the judgment should have been given, either to the said *Abraham Wood*, against all of them, the said *Peter*, *James*, *Thomas*, *William Jackson*, *John*, *William Lee*, *Mary*, *Ellen*, *Abraham Dearden*, and *Elizabeth*, or for all of them the said *Peter*, *James*, *Thomas*, *William Jackson*, *John*, *William Lee*, *Mary*, *Ellen*, *Abraham*

ham

ham Dearden, and *Elizabeth*, against the said *Abraham Wood*, &c." Joinder in error. 1821.

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The case was argued on a former day.

Littledale, for the Plaintiffs in error. What appears on the pleadings in this case amounts, substantially, to the statement of a contract, and, if so, the action ought to be subject to all the accidents of an action on a contract. With the addition of a word or two, the present declaration would form a declaration in *assumpsit*; for the expression *in consideration*, is not necessary, where a consideration appears. The pleadings in *Coggs* v. *Bernard* (*a*) shew the convertibility of *assumpsit* and case in circumstances like the present. The plea there was, *not guilty*, but it might, with equal propriety, have been *non assumpsit*. If this action, which clearly arises out of a contract, be permitted to be framed in tort, the Defendants labour under the following inconveniences.

First, they cannot plead in abatement, and so bring before the Court all who are jointly liable; the consequence of which is, that in an action for contribution, the Plaintiff must prove his whole case, the record in the present action not being evidence for him, as it would be if this action were conceived in *assumpsit*. Besides, it would be questionable, whether contribution could be recovered at all from a joint tort-feazer. *Merryweather* v. *Nixan*. (*b*)

Secondly, if this action were brought against three, one of whom was not a joint proprietor, the other two could not call him as a witness, whereas if the action had been *assumpsit*, such third party could not have been joined.

(*a*) 2 *Ld. Raym.* 909. (*b*) 8 *T. R.* 186.

Thirdly,

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Thirdly, if the case had been reversed, and the Plaintiffs in error had sued the Defendant in error for his fare, they must have sued in contract, and have been bound by all the incidents of an action in that shape, and it seems inconsistent that the rule should not be mutual. *Powell* v. *Layton* (a), *Weall* v. *King* (b), and *Green* v. *Greenbank* (c), are direct authorities in favour of the Plaintiffs in error, to say nothing of the earlier cases of *Boson* v. *Sandford* (d), *Dale* v. *Hall* (e), and others; *Buddle* v. *Wilson* (f) points the same way. *Dickon* v. *Clifton* (g) and *Govett* v. *Radnidge* (h), are the only cases against them. But *Weall* v. *King* was decided subsequently to *Govett* v. *Radnidge*; and *Dickon* v. *Clifton* can scarcely be entitled to much weight, when the reporter has made the Court doubt whether trespass and trover could not be joined. *Mitchell* v. *Tarbutt* (i) is quite distinguishable from the other cases, because the circumstances were altogether independent of any contract, and *Max* v. *Roberts* (k) went off on a defect in the declaration.

Manning, for the Defendant in error. The inconvenience with respect to contribution does not exist, because joint proprietors of coaches are partners, and losses sustained by any one of them, on the partnership account, however occasioned, would, as between themselves, be the subject of an action of account or *assumpsit*, founded upon the partnership relation. As to a party who is not partner being comprehended in the action, for the purpose of excluding his testimony, the

(a) 2 *N. R.* 365.
(b) 12 *East*, 452
(c) 2 *Marsh.* 485.
(d) *Salk.* 440.
(e) 1 *Wils.* 281.
(f) 6 *T. R.* 369.
(g) 2 *Wils.* 319.
(h) 3 *East*, 62.
(i) 5 *T. R.* 649.
(k) 12 *East*, 89.

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Court will not intend that such a fraud will be attempted. With respect to the proprietors being obliged to sue in contract, and being subject to all the incidents of such a suit, it imposes no inconvenience on them, because they must necessarily know the various members of whom their firm consists, while the passenger, if compelled to sue in contract, may not be able to collect those names, except through the expense of a plea in abatement.

To come to the cases, there seems no reason for impugning the authority of *Dickon* v. *Clifton*, merely because the reporter has written trespass, meaning probably trespass on the case. Then *Coggs* v. *Bernard* makes an end of this argument, by shewing that a consideration is not necessary, and that, therefore, supposing the practice had been in these cases to declare indifferently in *tort* or *assumpsit*, if either should be excluded, it must be *assumpsit*. For if the declaration in that case had been considered as framed in *assumpsit*, it would have been bad, for want of shewing a consideration. But wherever the gist of the action is misfeasance, though *assumpsit* may be resorted to, case is the more proper remedy. *Keilway*, 160. *a*. In *Bosou* v. *Sandford*, the entry was *super se suscepit*. The declaration was, therefore, clearly in contract; and it appears, from the other reports of this case, that it was decided mainly upon this distinction. (*a*) *Mast* v. *Goodson* (*b*) is in favour of the Defendant in error, and is an answer to the case of *Green* v. *Greenbank*. In *Compton* v. *Richards* (*c*), the gist of the action was held to be tort, though arising out of a contract. It is assumed, on the other side, that a contract exists here; but

(*a*) 1 *Shower*, 104.; 3 *Mod.* 320., 3. — 3 *Levinz*, 351.

(*b*) 3 *Wils.* 348.

(*c*) 1 *Price*, 27.

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but that is not necessarily the case. If a place in a coach is vacant, a party may insist on being carried, but if he were overturned, he might not be able to sue in *assumpsit*. *Brown* v. *Dixon* (a) is in favour of the Defendant in error, and recognizes *Dickon* v. *Clifton*. *Mitchell* v. *Tarbutt*, it may be admitted, does not apply to the present case; nor is it in the least affected by *Dale* v. *Hall*. Then *Govett* v. *Radnidge* is in point, and that case has since been confirmed. (b) [*Richardson* J. I argued the case alluded to: the Court said, on dissecting the declaration, it appeared to be on the custom of the realm, and that nothing appeared from which a contract could be inferred.] *Weall* v. *King* was decided on a collateral point; it was not true that the Plaintiff bargained with *both* the Defendants, and therefore there was a variance between the contract proved and that declared on. In *Buddle* v. *Wilson* there was a preliminary point which occupied the attention of the Court; and in *Powell* v. *Layton*, *Dickon* v. *Clifton* was not adverted to.

Littledale, in reply, urged, that except *Govett* v. *Radnidge*, all the cases cited for the Defendant in error, were cases of tort, in which there was no element of a contract.

Cur. adv. vult.

DALLAS C. J. now delivered the judgment of the Court.

This comes before us by writ of error brought to reverse the judgment of the Court of the King's Bench.

The action is an action on the case against the Plaintiffs in error.

(a) 1 *T. R.* 274. (b) In the unpublished part of *M. & S.*

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The declaration stated, that, before and at the time of the grievances complained of, the Plaintiffs in error were proprietors of a certain stage-coach, for the conveyance of passengers for hire, from *Bury*, in the county of *Lancaster*, to *Bolton*, in the same county, and being so, that they received the Defendant in error, (who was the Plaintiff below) and he became an outside passenger, to be safely conveyed thereon from *Bury* aforesaid to *Bolton* aforesaid, for hire and reward, to the said Plaintiffs in error in that behalf, and that by reason thereof, the Plaintiffs in error ought safely to have conveyed, or caused to be conveyed accordingly, the said Defendant in error; it then alleges, that not regarding their duty in this behalf, they so conducted themselves, that, by and through the carelessness, negligence, unskilfulness, and default of themselves and their servants, the said coach was overset, by means whereof the Defendant in error was greatly bruised and wounded, and sustained other injuries.

To this declaration, the Defendants below pleaded, that they were not guilty, and issue was thereupon joined. The record states, that the cause was tried at the last assizes at *Lancaster*, when the jury found that two of the Defendants were not guilty, and that the other Defendants were guilty, and assessed the damages of the Plaintiffs below against them, besides the costs and charges at 50*l.* On this verdict, the Court of King's Bench have given judgment for the Plaintiff below, that he do recover damages and costs against the Defendants below, who were so found guilty, and that the two for whom a verdict of not guilty was given, go without day.

The matter for our decision is, whether this judgment be erroneous. On the part of the Plaintiffs in error,

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error, it was contended, that the statement of the case in the declaration amounts to a contract, and *that* being so, all the rules which relate to actions founded on contracts must govern, and that it is a rule of law that such actions are joint, and must be maintained against all the Defendants named in the declaration, or fail altogether. If it were true, that the present action is founded on a contract, so that, to support it, a contract between the parties to it must have been proved, the objection would deserve consideration. But we are of opinion, that this action is not so founded, and that, on the trial, it could not have been necessary to shew that there was any contract, and therefore that the objection fails.

This action is on the case against a common carrier, upon whom a duty is imposed by the custom of the realm, or in other words, by the common law, to carry and convey their goods or passengers safely and securely, so that, by their negligence or default, no injury or damage happen. A breach of this duty is a breach of the law, and for this breach an action lies, founded on the common law, which action wants not the aid of a contract to support it.

It appears, by the different books of entries (*a*), that this form of action is of very ancient use.

Nor is it material, whether redress might or might not have been had in an action of *assumpsit*; that must depend on circumstances of which this Court has no knowledge; but, whether an action of *assumpsit* might or might not have been maintained, still this action on the case may be maintained. The action of *assumpsit*, as applied to cases of this kind, is of modern use. The

(*a*) *Brownlow Redivivus* 11. *Clift.* 38, 39 *Mod. Ent.* 145. *Herne*, 76.

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action on the case is as early as the existence of the custom or common law as to common carriers.

If the action be not founded on a contract, but on a breach of duty depending on the common law, on a tort or misfeasance, it cannot be contended, that the Judgment is erroneous; for, from the nature of the case and the form of the action, it is several and not joint, and may be maintained against some only of those against whom it is brought.

In this view of the subject, the authorities principally relied upon by the Plaintiffs in error have no application.

The cases of *Powell* v. *Layton* and *Max* v. *Roberts* were decided by the same Judges: they are in no respect like the case now before us. Each of these cases is an action against owners of a ship, not stated to be a general ship carrying the goods of all who choose to send them; but it is stated as a particular employment in each case. In the first of these cases, *Powell* v. *Layton*, the declaration is, that the Plaintiff, at the special instance and request of the Defendants, had caused goods to be delivered to them, to be carried, conveyed, &c. Now it is obvious, that this was a case founded on a particular contract; therefore, said the Court, the Defendant's plea in abatement, that the Defendant, *Layton*, had a partner jointly interested, to whom the goods were delivered, as well as to him, the Defendant, is good, and this person ought to have been joined.

In *Max* v. *Roberts*, which was before the same Judges, the point in the cause was decided on the same principle, although the question arose in a different shape. There, the declaration stated, that the Defendants were owners of a ship, and that the Plaintiff delivered to them his goods to be carried, &c. On the trial, the Plaintiff failed in proving, that the Defendant, *Roberts*, and the

eight

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eight other Defendants, were part owners; by his evidence he affected the eight only; the same Judges who decided *Powell* v. *Layton*, held, that the owners had no duty imposed on them, but what arose by contract; and adhered to the decision in *Powell* v. *Layton*.

In the present case, a duty was imposed on the Defendants which did not arise by the contract, but by the custom or common law of *England*.

It is not material, therefore, to contrast the decision in these cases, of *Powell* v. *Layton* and *Max* v. *Roberts*, with the decision of the Court of King's Bench in the earlier case of *Govett* v. *Radnidge*, because this case differs from them. If these cases become opposed to each other, it must remain to be decided hereafter which of them is right, if they differ. At present, it is sufficient to say, that this action is founded on a misfeasance, and that the declaration is framed accordingly; and therefore, that the verdict and judgment given against some of the Defendants is not erroneous, and ought to be affirmed.

Judgment affirmed.

IN THE EXCHEQUER CHAMBER.

DE TASTET v. RUCKER and Others. (In Error.)

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Error was assigned on a misnomer of one of the Plaintiffs below in the warrant of attorney, and also on the omission of any entry of verdict and judgment upon an issue joined on a plea of set-off. The Court held, that there was nothing in the first objection, and gave leave to amend the transcript as to the second.

THE Plaintiff assigned for error, first, the insufficiency of the declaration; secondly, that, by the record, it appears, that, in the warrant of attorney filed and remaining of record in the court below, to warrant *George Tomlinson* to be attorney for *Martin Albert Rucker*, *John Ernest Frederick Westphalen*, and *John Christoph Frederick Rist*, against *Firmin de Tastet*, in the plea aforesaid, the said *John Christoph Frederick Rist* is described by the name of *John Christoph Rist*, and not by the name of *John Christoph Frederick Rist*.

Thirdly, That, by the record, it appears that there is no warrant of attorney filed or remaining of record in the said court of, &c., between the parties aforesaid, to warrant *George Tomlinson* to be attorney for the said *M. A. R.*, *J. E. F. W.*, and *J. C. F. R.*, against the said *F. de T.*

Fourthly, That, by the record aforesaid, it appears, that, in the warrant of attorney filed, remaining of record in the court below, between the parties aforesaid, to warrant *James Lowe* to be attorney for the said *F. de T.*, at the suit of the said *M. A. R.*, *J. E. F. W.*, and *J. C. F. R.*, in the plea aforesaid, the said *J. C. F. R.* is described by the name of *J. C. R.*, and not by the name of *J. C. F. R.*

Fifthly, That, by the record aforesaid, it appears, that there is no warrant of attorney filed or remaining of record in the said court of, &c. between the parties afore-

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said, to warrant the said *Charles L.*, to be attorney for the said *F. de T.*, at the suit of the said *M. A. R.*, *J. E. F. W.*, and *J. C. F. R.*

Sixthly, That, by the record aforesaid, it appears, that there were two issues joined between the said *M. A. R.*, *J. E. F. W.*, and *J. C. F. R.*, and the said *F. de T.*; but that the jury, who were summoned to try those issues, found a verdict for the said *M. A. R.*, *J. E. F. W.* and *J. C. F. R.* on one of those issues only, but did not find a verdict for the said *M. A. R.*, *J. E. F. W.*, and *J. C. F. R.*, or for the said *F. de T.*, on the other of the said issues.

At a former day in this term, *Pollock F.* had obtained leave to amend the transcript of the record, as to the last error assigned, and had subsequently amended the *nisi prius* record and judgment roll, by an application in the court below.

Littledale, for the Plaintiff in error, now applied to have this rule to amend the transcript discharged *quia improvidè emanavit*. The proper course would have been, first, to obtain a rule in K. B. to amend the *postea*; and, afterwards, the judgment: whereas the rule here was to amend the transcript, before any alteration in the judgment in K. B. This court has no power to make such a prospective order.

Finding the Court against him upon this point, he cited many cases from 1 *Roll. Abr.* 289., and 3 *Viner Abr.* 292. *Com. Dig.* tit. *Amendment*, in which judgments had been reversed for the first cause assigned. These were all antecedent to the statutes of jeofails (*a*), or did not appear to have been after verdict; but he contended, that though the want of a warrant of attorney was cured after verdict, yet, that here a warrant of attorney was

(*a*) 32 *H.* 8. *c.* 30. 18 *Eliz.* *c.* 14.

certified,

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certified, varying from the name of the party on the record; and that a bad warrant, like a bad original, remained as before the statutes. He also referred to several modern cases upon misnomer and variance (*a*), not, however, distinctly applying to warrants of attorney. And he urged, that, as warrants of attorney may be filed at any time before final judgment, the Defendant below had no opportunity of pleading in abatement, or of making any application to the Court on the ground of the variance.

Pollock F., *contrà*, contended, that this must be taken to be no warrant, as between these parties, in which case the omission was cured by the statutes, as it was a misnomer in some part of the record, but whether in the warrant of attorney or in the pleading, the Court had no means of judging.

The Court said there was nothing in the objection, and affirmed the judgment. (*b*)

(*a*) *Corbett* v. *Bates*, 3 *T. R.* 660. *Shadgett* v. *Clipson*, 8 *East*, 328. *Delanoy* v. *Cannon*, 10 *East*, 328. *Dring* v. *Dickenson*, 11 *East*, 225.

(*b*) The Reporters are indebted to a gentleman at the bar for the note of this case.

END OF TRINITY TERM.

CASES

ARGUED AND DETERMINED

1821.

IN THE

Court of COMMON PLEAS,

AND

OTHER COURTS,

IN

Michaelmas Term,

In the Second Year of the Reign of GEORGE IV.

MEMORANDA.

In consequence of the demise of the Queen in the last vacation, *Henry Brougham*, Esquire, and *Thomas Denman*, Esquire, of *Lincoln's Inn*, Barristers at Law, who had filled the offices of Attorney and Solicitor-general to her Majesty, in this term, resumed their seats without the bar.

In vacation after *Michaelmas* term, *William Elias Taunton*, Esquire, *Christopher Puller*, Esquire, *Lancelot Shadwell*, Esquire, *William George Adam*, Esquire, and *Edward Burtenshaw Sugden*, Esquire, all of *Lincoln's Inn*, Barristers at law, were respectively appointed his Majesty's counsel, and took their seats within the bar accordingly.

Shortly after the end of this term, at his house in *Russel Square*, died Sir *James Mansfield*, Knt., formerly Lord Chief Justice of the Court of Common Pleas,

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WILLIAMS *v.* SAWYER, Esq.

Held, that an agreement (dated *October* 27. 1819, and stamped with a 20*s*. stamp) between landlord and tenant, that the landlord should have immediate possession, (except as was mentioned), of a farm, lands, and premises, which had been occupied by the tenant for a term, the landlord to take the stock, and the tenant to hold over half the house, half the stable, the barns, and an inclosed ground, and to have the joint use of the yard with the landlord or on-coming tenant, till the 25th *January* following, without rent, &c. was properly rejected in evidence, on the ground that it operated as a surrender of the term, and therefore required a deed stamp, under 55 *Geo.* 3. *c.* 184. *sched. part* 1.

TRESPASS against the late sheriff of *Berks*, for taking the Plaintiff's goods and farming stock. Plea, general issue. At the trial, before *Abbott* C. J., at the last assizes for *Abingdon*, it appeared, that the Defendant levied and sold the goods as the goods of *John Palmer*, under a *fieri facias* against him, shortly after the 25th *January*, 1820. The farm was let by the Plaintiff to *Palmer*, in *July*, 1817, by a *memorandum* of agreement on unstamped paper, under which he held the farm, till *October*, 1819, when, the rent being considerably in arrear, he entered into an agreement with his landlord, dated 27th *October*, 1819, by which he agreed to give up to his landlord (the Plaintiff) the immediate possession of the farm, lands, and premises, &c. (except as was mentioned.) In consideration whereof, his landlord agreed with him, to take the whole of his stock of hay (except one rick) at a valuation, and to make a compensation for the fallows, which the said landlord or his on-coming tenant should enter upon immediately; all taxes, highways, duties, and outgoings, in respect of the said farm to be paid and performed by the tenant, up to the 10th of *October* preceding. The said tenant to have liberty to hold over and enjoy half the house, half the stable, and the barns; and to have the joint use of the yard with the landlord, or his coming-on tenant, and also the inclosed ground, called, &c. and the cowpens therein, up to the 25th day of *January* ensuing,

without

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without paying any rent or taxes for or on account of the same. (Signed by the parties, and witnessed.)

This agreement was stamped with a 20*s.* stamp, when produced in evidence by the Plaintiff. The counsel for the Defendant objected to its admissibility, on the ground that it operated as a surrender of the term, and therefore required a deed stamp. (*a*) *Abbott* C. J. directed a nonsuit on this ground, but gave the Plaintiff leave to move. Accordingly,

Bosanquet Serjt. now moved to set aside the nonsuit and have a new trial, on the ground that this was merely an agreement to surrender a part of the premises, and, therefore, possession of a part only being given, could not operate as a surrender of a whole term.

But *the Court* were unanimously of opinion, that the instrument operated as a surrender of the term, and

Bosanquet took nothing by his motion.

Rule refused.

(*a*) The amount of which is 1*l.* 15*s.*, by 55 *Geo.* 3. *c.* 184. *sched. part* 1.

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Nov. 12.

SEVERN and Others *v.* OLIVE and Others, Directors of the IMPERIAL Insurance Company;

Same *v.* SLADE and Others, Ditto.

Same *v.* WILSON and Others, Directors of the PHŒNIX Insurance Company;

Same *v.* SHUM and Others, Ditto.

The expense of experiments necessarily made for the purpose of affording evidence on a point in dispute new to scientific men, is not allowed on taxation of costs.

Nor are scientific and professional witnesses allowed any compensation for loss of time, unless they be medical men.

Two actions against one insurance company, and two against another, on the same loss, were at issue in *Hilary* term, 1820: the second, third, and fourth were set down for trial, at the sittings after that term; but not the first, upon two of the pleas in which there were demurrers. The second cause was tried at those sittings, and a verdict was found for the Plaintiff. A rule *nisi* for a new trial in this cause was obtained in *Easter* term; but suspended from time to time, till one of the other causes should also have been tried, and the result of certain proposed experiments touching the point in dispute be made known. At the sittings after *Michaelmas* term, 1820, the first, third, and fourth causes were set down for trial; and the third, which then stood first in the paper, was tried, on which a verdict was found for the Plaintiff: Held, that the costs were rightly apportioned by the prothonotary, half to be paid by one company, and half by the other.

THE Plaintiffs had insured a sugar-house, in four several policies, at the offices of which the Defendants were directors, and, the sugar-house having been burnt down, brought four actions on these policies. The actions were all at issue in *Hilary* term, 1820; the second, third, and fourth were set down for trial at the sittings after that term, but not the first, upon two of the pleas in which there were demurrers. The second cause was tried at those sittings, and a verdict obtained for the Plaintiff; a rule *nisi* for a new trial in this cause was obtained in *Easter* term, but suspended from time to time, till one of the other causes should also have been tried, and the result of certain proposed experi-

ments

ments affecting the point in dispute be made known. At the sittings after *Michaelmas* term, 1820, the first, third, and fourth causes were set down for trial, and stood in the following order. *Severn* v. *Wilson*, *Severn* v. *Shum*, *Severn* v. *Olive*; and *Severn* v. *Wilson* was tried.

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The defence being that the Plaintiff had, without the knowledge of the Defendants, used, in the boiling of sugar, a newly invented process more dangerous than the old one; a great number of expensive experiments were made by both parties, to ascertain the effects of this process, which consisted in the employment of oil, heated to an extraordinary temperature, and many scientific and professional men of eminence, among others, a lecturer at the university of *Glasgow*, were called, to give their opinions as to the safety or danger of the process, and the result of the experiments. These opinions were contradictory. The jury found a verdict for the Plaintiffs.

The prothonotary, in taxing costs, having allowed various sums for the money laid out in experiments, and for the time of the scientific and professional men employed in making them, and called as witnesses, and having apportioned the costs, half to be paid by the *Phœnix* and half by the *Imperial* office,

Hullock Serjt., for the Defendant *Olive*, on a former day, obtained a rule, calling on the Plaintiffs to shew cause why the prothonotary should not review his taxation, on the ground that these sums ought not to have been allowed; and that, as only three causes were set down for trial at the same sittings, the apportionment of the costs to the *Imperial* office ought to have been one third instead of one half.

Lens, *Vaughan*, and *Taddy* Serjts. now shewed cause against the rule, and urged, that expenses incurred in furnishing evidence on a matter of opinion (more especially

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cially in such a case as this, where virtually such matter was the point in issue) could not be distinguished in principle from expenses incurred in furnishing evidence on a matter of fact; expenses which were always allowed in costs; that the process of boiling sugar, by the application of heated oil, being a new discovery, it was impossible for the most scientific witnesses to speak on the subject, without having had recourse to actual experiment; so that the results of these experiments were a necessary part of the evidence adduced; that with regard to the allowance for the time of scientific and professional witnesses, though it was certain that witnesses in general were entitled to no compensation for loss of time, yet there was an exception in behalf of medical men and attornies; within the spirit of which exception, professional men of science, at least, must be considered to fall, the real ground of exception being the lucrative application of scientific acquirement. Lastly, with regard to the apportionment, that the two offices having had the mutual benefit of the experiments, ought equally to share the expenses.

Hullock Serjt, in support of the rule. There is no instance in which an allowance has been made for experiments, or for any expenses which have merely contributed to the groundwork of an opinion. Witnesses have no allowance for making a view; and in actions touching the working of mines, scientific men, brought from great distances, for the purpose of taking plans, and rendering themselves otherwise competent to pronounce an opinion, have no allowance for their preparatory expenses. As well might the Defendants be charged for the expense of entering and maintaining a man at the university, in order to render him competent to decide in matters of science, as for these preparatory experiments. If the process was new, the Plaintiffs

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Plaintiffs ought to have known the effects of it before they ventured to use it; if they knew the effects, the experiments were superfluous. As to the allowance for time, it is difficult to say why physicians should have such an allowance, inasmuch as they cannot sue for fees. But at all events, the exception has extended no further. *Moor* v. *Adam* (a), *Willis* v. *Peckham*. (b)

The apportionment ought to depend on the state of the causes when they went down to trial; there were then only three on the list; and the Court cannot connect what passed at a subsequent, with what passed at a former, sitting.

The Court directed, that the prothonotary should review his taxation, on the ground that no allowance ought to be made for the expense of experiments, nor for the time of scientific witnesses, unless they were medical men, such as physicians or surgeons, and referred to the cases of *Moor* v. *Adam* and *Willis* v. *Peckham*, as conclusive, that compensation for loss of time could not, in this case, be allowed to others.

Rule absolute.

(a) 5 *M. & S.* 156. (b) *Ante*, I. 515.

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Nov. 13.

Goods of the principal in the hands of his factor cannot be distrained by the landlord of the factor's premises for arrears of rent due to him from the factor.

TROVER for bombazeens. At the trial, before *Dallas* C. J., (adjourned sittings after *Trinity* term last,) a verdict was found for the Plaintiff, damages

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196*l.*, subject to the opinion of the Court, on the following case.

The Plaintiff, who is a bombazeen manufacturer at *Norwich*, had been in the habit of sending parcels of goods for sale, upon commission, to *Thomas Milne*, (now deceased,) who was a factor and broker, and also traded on his own account. On the 16th *February* and 5th *March*, 1819, the goods in question were sent, packed in bales, and marked *I. G.* (the Plaintiff's initials) to *Milne*, to be by him, as factor of the Plaintiff, sold for the account of the Plaintiff, in the usual course of their business, and were received by *Milne* on the 10th *March*, at his ware-room and counting-house, which he rented of the Defendant, in *Walbrook*, *London*, as a yearly tenant. On the 6th *March*, 1819, the Plaintiff drew a bill of exchange of that date on *Milne* for 200*l.*, on account, which bill *Milne* accepted, and returned to the Plaintiff, who afterwards cashed the same with his bankers at *Norwich*, and the bill, after the death of *Milne*, was duly presented by the said bankers' agents in *London* for payment, at the late ware-room and counting-house of *Milne*, and returned not paid. On the 16th *April*, 1819, *Milne* died, the goods then remaining unsold in the ware-room. On the following day, the Defendant distrained them for 93*l.*, his arrears of rent due from *Milne*, for the ware-room and counting-house. On the 24th of the same month, a formal demand of the goods was made on behalf of the Plaintiff upon the Defendant, who thereupon refused to deliver them, alleging, as a reason for his refusal, that he detained them under the said distress.

The question for the opinion of the Court is, whether, under the circumstances above stated, the Plaintiff is entitled to recover. If the Court should be of that opinion, the verdict is to stand, but if of a contrary opinion, a verdict is to be entered for the Defendant.

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Marshall Serjt., for the Plaintiff. This is a case of great importance, considering the extensive interests which will be affected by the decision; but, as there is no case in point, it must be determined on principle; and, on principle, the Plaintiff contends, that goods in the hands of a factor are not liable to distress for rent due from the factor. Generally speaking, the landlord is entitled to distrain for rent arrear, whatever chattels he finds on the land demised; but there are exceptions to this rule; and the case of a factor falls within an exception which has been clearly laid down in favour of trade and commerce. Thus, goods exposed to sale in a market are exempt from distress (*a*); a horse in a smith's shop; cloth at a tailor's, &c. (*b*); goods in the hands of a carrier, whether private or public; *Gisbourn* v. *Hurst* (*c*); and the same principle is deducible from *Trassell* v. *Morris* (*d*), and *Simpson* v. *Hartopp*. (*e*) The exemption of goods in the hands of a factor is expressly stated in the argument, in *Francis* v. *Wyatt* (*f*), and not denied by *Blackstone*, the opposite counsel, nor by the Court. If such goods were liable to seizure, the consequences to trade in general must be extensively pernicious. *Paterson* v. *Tash* (*g*) and *Newsom* v. *Thornton* (*h*), shew, that the factor is only a servant, and cannot *pledge* the goods of his principal.

Lawes Serjt., for the Defendant. These goods were placed in the hands of *Milne*, rather as a security than as with a factor for sale, *Milne* having accepted a bill on account; but, supposing him to have been employed as

(*a*) 1 *Roll. Ab.* 668. *pl.* 11. *Co. Lit.* 47. *a.*

(*b*) *Co. Lit.* 47. *a.* 1 *Roll. Ab.* 668. *pl.* 12. *Com. Dig. Distr.* C.

(*c*) *Salk.* 250.

(*d*) *Noy.* 19.

(*e*) *Willes*, 512., cited in *Gorton* v. *Falkner*, 4 *T. R.* 568.

(*f*) 3 *Burr.* 1503.

(*g*) *Str.* 1178.

(*h*) 6 *East*, 17.

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a factor, the goods are not exempt from the Defendant's distress, who, as landlord, is entitled to take all he finds (*a*), unless particularly protected or exempted. (*b*) The exceptions in favour of trade are confined to cases where something is to be wrought on the thing deposited, (as in the case of clothes left with a tailor to be made up, or with a fuller to be fulled); and cases where the publicity of the deposit enables the landlord at once to presume, that the goods do not belong to his tenant; as goods placed in a fair to be sold, or horses put up at an inn. The tailor may be compelled to work on the cloth (*c*), and the innkeeper to receive the guest; there is not, necessarily, any compact between them and their employers; their offices are necessary; but the business of a factor is neither public nor absolutely necessary; it is matter of private compact. The landlord has no reason for suspecting that the goods which he sees at the factor's do not belong to his tenant; and the manufacturer, instead of depositing them there, might journey to *London*, and superintend the sale himself, or sell them where they were manufactured. The rights of the landlord have always been protected and favoured by the law. It would be most inconvenient to him, if the existing exceptions were extended to the case of factors. Such a decision would subject him to repeated frauds or repeated actions of trespass. The *dictum* in *Francis* v. *Wyatt*, having fallen only from counsel in the course of argument, is entitled to no weight as authority; and it is entirely omitted in *Blackstone*'s reports. The decision turned on the ground that there was a private compact, and is therefore in favour of the Defendant. No case can be found in which goods in the hands of a factor

(*a*) 3 *Blackst. Comment.* 7. *Com. Dig. Distr.* B. 1.

(*b*) *Co. Lit.* 47. *a.*

(*c*) 22 *Ed.* 4. 49.

have

have been held to be exempted; but cattle sent to agistment have been held liable. *Com. Dig. Distr.* B. 1. *Fowkes* v. *Joyce*. (*a*)

Marshall, in reply, urged, that the case of *Rede* v. *Burley* (*b*), proved, that the exemption was not limited by the publicity of the deposit, and *Gisbourn* v. *Hurst*, that it extended to other objects besides those which were to be wrought on in the hands of the bailee.

DALLAS C. J. The general right of landlords to distrain is clearly protected in point of law; and I agree, that whatever is found upon the premises is *primâ facie* taken as belonging to he tenant; the rule grows out of the relation of landlord and tenant, and out of the nature of the thing itself; for all such rules are of simple origin. But rules which are of simple origin, if very general, become in time, and from change of circumstances, inconvenient, and thence, subject to exceptions. Exceptions to this general right of distress arose at a very early period, and have ever since been recognised by the Courts. The question, therefore, is, whether the present case comes under the general rule, or falls within one of the exceptions; and it will be necessary, first to advert to what is the foundation of the landlord's general right to distrain; the right to distrain the goods of one man on the premises of another, not being of natural origin, but of artificial contrivance. *Ashurst* J., in *Gorton* v. *Falkner* (*c*), lays it down thus: "The foundation of this principle is, that, as the landlord is supposed to give credit to a visible stock on the premises, he ought to have recourse to

(*a*) 2 *Vent.* 50.
(*b*) *Cro. Eliz.* 596.
(*c*) 4 *T. R.* 568.

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every thing which he finds there." And in another place, "The right of landlords to distrain the property of a third person, for rent due from their own tenants, is founded on reasons of public convenience, and calculated for the preventing of fraud" (*a*); (fraud by which the tenant would be enabled to protect his property, if such a rule did not exist;) "and the exceptions out of the general rule are all of them tending to the benefit of trade and commerce, and general advantage." The rule was evidently founded, not on natural, but artificial arrangements. It was a rule to prevent a particular species of inconvenience which would otherwise have arisen. But as it was found that this rule, when universally enforced, created another kind of inconvenience, extensive in its nature, exceptions were necessarily introduced. In like manner, therefore, and on the same principle of public convenience, a rule has been adopted in favour of trade and commerce; and, as the landlord is protected under the general right of distraining, so goods of a certain description, and in certain situations, are protected, in favour of trade and commerce. The question is, whether this case, duly considered, falls within the latter exception or the general right. The exception has been clearly laid down: "Goods delivered to any person exercising a public trade or employment, to be carried, wrought, or managed in the way of his trade or employ, are, for that time, under a legal protection, and privileged from distress for rent." (*b*) "Materials sent to a weaver, or cloth to a tailor to be made up, are privileged, for the sake of trade and commerce, which could not be carried on, if such things, under these circumstances, could be distrained for rent due

(*a*) *Per Ashurst arguendo, Burr.* 1500.

(*b*) *Gisbourn* v. *Hurst, Salk.* 250.

from

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from the person in whose custody they are." (*a*) *Blackstone*, after enumerating similar objects, says, " these are protected and privileged for the benefit of trade" (*b*), and the Court is bound to consider the rule of public convenience as applicable to trade and commerce. The facts of this case clearly shew, that the goods were received in *London* by the factor in that particular character; and, on the ground of public convenience, it has been asked why could not the manufacturer sell the goods in the place where they were manufactured? Perhaps he could do so. But will it be gravely urged, that the commerce of *London* should be annihilated, and persons at a distance compelled to sell on the spot, or to travel to *London*, for the purpose of saving their goods from a distress? Can this be consistent with public benefit or public convenience? It seems to me, that all the decided cases are consistent with the public advantage, and that it would be at once detrimental to the public, and inconsistent with the cases, if we were to hold, that goods in the custody of a factor were liable to seizure in the manner contended for. The nature of the exception, on the score of necessity or public convenience, is laid down by *Blackstone*, in the argument in *Francis* v. *Wyatt* (*c*): " It is, where it would be quite impracticable or highly incommodious to dispose of or manufacture the goods at home." Would it not be incommodious to dispose of manufactured goods at home? The public convenience runs through all the cases of exception, and on general principle and analogy, this question comes within the scope of those decisions. As to the case of *Wyatt* v. *Francis*, (when all the analogies are in favour of the exemption of goods in the hands of a factor, and there is no decided case at vari-

(*a*) *Willes*, 515.
(*b*) 3 *Blackst. Com.* 8.
(*c*) 1 *W. Bl.* 484.

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ance with such a position,) it seems to me important, that the assertion in argument, touching the exemption of such goods, was not controverted by the opposing counsel or by the Court itself. I am aware, that in cases like this, in exceptions turning on nice distinctions, it is dangerous to lay down a general rule more broadly than is required; and (though the case does not seem distinguishable from that of goods sent to a wharf or market, which have been holden to fall within the exception, on grounds of public convenience,) I expressly confine my present decision to goods in the hands of a factor. Considering that such goods are exempt from distress, on the general grounds before stated, I think the Plaintiff, in the present case, is entitled to recover.

PARK J. The circumstance that this is a case of novelty and importance will excuse me for saying a word, after the very luminous judgment of my Lord Chief Justice. The general rule as to a landlord's right to distrain is perfectly clear and well understood; but Lord *Coke* says there are five exceptions to this rule, which exceptions *Willes* C. J. recognizes in *Simpson* v. *Hartop*, and states which of them are *sub modo*, and which absolute. Therefore, though the general rule be old, the exceptions are themselves as old.

The instances mentioned under the exception as to trade, in Lord *Coke*, are not put as limiting or comprehending the whole exception, but merely by way of illustration. The principle of the exception is admirably put by Lord *Holt* in *Salkeld* (*a*), and his language shews that the exception was not established for the benefit of the individual, but of trade in general; he extends it to goods to be carried, wrought, or *managed*; and are not

(*a*) 250.

goods

goods placed in the hands of a factor to be managed? —this case falls strictly within his definition. The case in *Cro. Eliz.* (*a*) is also strong to shew that it is the trade which is favoured, not the individual. But it has been asked, why the manufacturer does not himself travel to *London?* It would be impossible for him to do so, consistently with his interests; and the trade of a factor is as well known as any that is carried on. The case of cattle at agistment may be laid out of consideration; and the question is, whether this does not come within the exception in favour of trade and commerce: I think that it does.

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BURROUGH J. This case is to be decided on principle, and on the principle of all the decisions. From the earliest times, these exceptions to the general right of the landlord to distrain, have existed; the question therefore is, whether this case falls within the principle of the exception in favour of trade. In none of the cases has that principle been put, as if in favour of any particular trade, but for the advantage of trade in general. No one can read the case of *Francis* v. *Wyatt* in *Burrow*, without seeing that the case of a factor falls within the principles there laid down; and it is not surprising, that positions contained in the report in *Burrow*, should not appear in the report of the same case in *Blackstone*, because it is well known, that *Blackstone's* reports were published from his manuscripts after his death. The trade of a factor has indeed increased since the time at which that case was argued; but commerce in general, and the business of *London* and the country, could not be carried on without it. The trade of a factor is as well known as any other.

(*a*) *Rede* v *Burley*.

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RICHARDSON J. The right of the landlord to distrain is general; but there are several exceptions to this right, independently of modifications by statute, which do not affect the present question. At common law, there has always been this exception, (which applies to the present case,) that goods put into the hands of a trader, to be wrought, manufactured, or managed, are protected and privileged from distress. It has been contended, that this is only the case where they are to undergo some alteration in the hands of the trader; but it is not necessarily so, for a carrier does not operate upon goods, except to carry them; and the very words of the decision in *Gisbourn* v. *Hurst*, include carrying or managing. The advancement of trade equally requires that goods should be placed in the hands of a factor for sale, as that they should be placed in the hands of a carrier for carriage. It may be said, indeed, that the manufacturer might carry his own goods; but such an argument does not shew any great regard for trade. Surely it is conducive to trade that goods should be sent from the place where they are wrought to the market where they are sold. Foreign goods must be so sent, when the wants of the importing country require it; but, it would be highly injurious to trade, if goods so sent for sale were liable to be distrained for the private debt of the factor. The instances enumerated by Lord *Coke*, under the exception in favour of trade, are only put by way of example; and the present case falls clearly within the principle of the exception.

Judgment for the Plaintiff.

DOE on the Demise of PENWARDEN *v.* JOHN GILBERT and Another.

Nov. 14.

THIS was an action of ejectment, brought by *Azarius Penwarden*, as heir at law of *Agnes Hatherly*, to recover the possession of two tenements, called *Bromehills* and *Blackhills*, in the parish of *Pancraswicke* in the county of *Devon*, in the possession of the Defendants. At the trial, before *Holroyd* J., at *Exeter*, at the last *Lent* assizes, a verdict was taken for the Plaintiff, subject to the opinion of this Court, upon the following will, which was duly executed, to pass real estates:

Devise. "As for my *temporal* estate and effects, I give and dispose of the same in manner following: I *give and bequeath* to *L.C.* 4*l.*; I give and bequeath to *M.H.* 3*l.*; I give, *devise*, and bequeath to *J. G.* all my lands, tenements, and hereditaments, with their appurtenances, particularly those called *B.* and *C.*; and all the rest and residue of my goods and chattels, personal and *testamentary effects* whatsoever, I *give and bequeath* to the said *J. G.*, whom I make sole executor of this my will;" Held, that *J.G.* took a fee in the lands *B.* and *C.*

" I, *Agnes Hatherly*, do make this my last will and testament, in manner and form following: First, I resign my soul to God, &c., and as for my temporal estates and effects, I give and dispose of the same in manner and form following; that is to say, I give and bequeath unto *Lydia Casely*, the sum of 4*l.*; also I give and bequeath unto *Mary Hatherly*, of the parish of *Bridgerule*, widow, 3*l.*, which, with the last legacy, I order and direct to be paid by my executor after my decease. Also I give, devise, and bequeath unto *John Gilbert*, of *Pancraswicke* aforesaid, all my lands, tenements, and hereditaments, with their and every of their appurtenances, and particularly those called and commonly known by the name of *Bromehills* and *Blackhills*, situate, lying, and being in *Pancraswicke* aforesaid, and which were lately the lands of my deceased husband, *William Hatherly*; and all the rest and residue of my goods and chattels, personal and testamentary estate and effects whatsoever I give and bequeath unto the said *John Gilbert*, whom I make whole and sole executor of this my last will and testament. In witness, &c."

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In case a life-interest only passed to *John Gilbert* by the above will, then the verdict for the Plaintiff, taken at the assizes, was to stand; but, if the fee passed under that will, then it was admitted that the Defendants were in the lawful possession of the property, and a verdict was to be entered for them.

Bosanquet Serjt., for the Plaintiff. The Defendant took only an estate for life. From the language of this will it may be inferred, that the testatrix knew the import of technical terms: *give and bequeath* are applied to the legacies at the beginning of the will, and to the bequest of personalty at the end; and *devise* is applied to the lands; so that latitude of construction is here less allowable than in cases where the testator was ignorant. The introductory clause shews an intention to leave no property undisposed of; but a mere demonstration of intention in an introductory clause will not convey an estate, unless the intention be afterwards carried into effect by apt words. *Doe dem. Spearing* v. *Buckner*. (a) No words of inheritance are attached to the devise of lands in the body of the will; and though the words *all my effects* (which when accompanied with certain expressions pointing to the realty, have been holden to carry a fee,) *Hogan* v. *Jackson* (b), are found in the residuary clause, those words, when alone, mean personal effects. *Camfield* v. *Gilbert*. (c) Here, *à fortiori*, being accompanied by the word *testamentary*, and preceded by the word *bequeath*, which the testatrix knew how to employ scientifically, they can only comprehend chattels; for testamentary effects given to the executor, in the same sentence in which the executor is appointed, are such effects as would pass by testament, and would pass to

(a) 6 *T. R.* 612.
(b) *Cowp.* 299.
(c) 3 *East*, 521.

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an executor. These are only chattels, since, strictly speaking, a testament is applied to the bequest of chattels; a will to the devise of lands. (*a*) At all events, the expression *all my effects* in a residuary clause, has only been holden to carry a fee in property, of which there has been no previous disposition in the same will. Here the lands are expressly given in terms which convey an estate for life; and it is a rule, that an estate which is given in express terms shall not be enlarged by implication, unless the implication be essential to advance an intention expressed in the will. But, in this case, it must be presumed, that the testatrix gave, by the express clause, all the interest which she intended to pass in the land. It is not reasonable to suppose that she intended to give that by the residuary clause which she had already given by express terms in a former clause. In *Smith* v. *Coffin* (*b*), (where lands were held to pass under the words *testamentary estate* in the residuary clause, coupled with some general expressions in the introductory part of the will,) there was no *previous* disposition of the lands. In that case, too, the heir at law was provided for by the testator, and the residuary estate charged with the payment of debts; all which circumstances distinguish it from the present. But that case was never cordially adopted nor acted on in decision, it carries the doctrine too far, and is not adverted to in other books, and *Doe dem. Spearing* v. *Buckner* proves, that the words, *all the rest, residue, and remainder of my estate and effects, of what nature or kind soever and wheresoever*, do not of necessity carry the real property, even when a strong intention is expressed in the introductory clause: to the same effect is *Shaw* v. *Bull* (*c*), and *Timewell* v. *Perkins*. (*d*)

(*a*) *Godolph.* 4. *s.* 5.
(*b*) 2 *H. Bl.* 444.
(*c*) 12 *Mod.* 593.
(*d*) 2 *Atk.* 102.

Taddy

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Taddy Serjt., for the Defendant. The Defendant took a fee. The intention of the testatrix to leave none of her property undisposed of is quite manifest, from the whole will taken together; and she has used words sufficient to carry that intention into effect. The expression in the residuary clause being "personal *and* testamentary effects;" the word *testamentary* is tautologous if it does not carry the fee; but the Court is bound to give, if possible, an effect to every word; and *testament* does not apply exclusively to bequests of chattels, for the statute of wills employs it as applicable to devises of land. As executor also, the defendant must take a fee, because he is required to pay the legacies in three months, and a fee might be necessary to enable him to do this. *Denn dem. Mellor* v. *Moor.* (*a*) *Smith* v. *Coffin* is precisely in point for the Defendant; and the circumstance of there being here a previous disposition of the particular estate will not make any difference; the words *remainder and residue* having been holden to carry a fee, where an estate for life had passed in a preceding part of the will. *Hogan* v. *Jackson.* In *Timewell* v. *Perkins*, *Doe* v. *Buckner*, and *Shaw* v. *Bull*, the circumstances were not the same as in the present case.

Bosanquet, in reply. The expression *rest and residue* is not coupled here with effects real, as the words *remainder and residue* were in *Hogan* v. *Jackson*, but with *personal effects*. The payment of legacies is never a charge on the land, unless land is mentioned for the purpose.

Dallas C. J. Every case of this sort depends on its own peculiar circumstances; for, in every case, the

(*a*) 1 *B. & P.* 562.

question

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question is one of construction to be made on the whole of the will; every case, therefore, is individual, and to be looked at with much caution; and the necessity for caution is the greater, when we consider, as *Heath* J. says, in *Smith* v. *Coffin*, that "Wills are frequently made *in extremis;* sometimes when the agonies of death are approaching; and it would be unfair to construe strictly the words used by an ignorant testator in that situation." The authority referred to in the present instance is *Smith* v. *Coffin*, where it was truly observed by *Buller* J., "Cases of this sort depend on niceties of expression, and sometimes even on a single word; and it has been frequently said, the nonsense of one man cannot be a guide for that of another;" and I, for one, should be very sorry to decide one case of this kind by another of the same kind, unless, on comparison, the two were found precisely alike. As to the case of *Smith* v. *Coffin* itself, if there were any doubt respecting it, it might require more consideration. That it is a single case, and carrying the doctrine far, (not meaning to say unsupported by principle,) that it is not adverted to in other books, comes to me for the first time. The testator meant to dispose of his whole property, and such in general is the intention of testators; but that is not sufficient, unless the will contains words to carry the fee. Here, under the clause containing the devise of the real property, if that clause be taken alone, an estate for life only passes; but the question is, whether it can be connected with the intention to dispose of the whole, expressed in the introductory clause, and with the general words *all my testamentary estate and effects* in the residuary clause, so as to pass the fee. There are many cases in which the words *estate and effects* will give a fee from the company in which they are found. So that, considering the case of *Smith* v. *Coffin*, and that the word *testamentary* is here accom-

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companied by nearly the same expressions as it was in that case, it appears clear, that the testatrix, in the present instance, has, by the introductory words, expressed an intention to dispose of all her property, and in the residuary clause, used expressions sufficient to carry that intention into effect. Indeed *Heath* J., in *Smith* v. *Coffin*, thinks the residuary clause would not have been sufficient without the word *testamentary*. I am unable to distinguish this case from that of *Smith* v. *Coffin*, and, therefore, without going more at large into the question, I think, on the authority of that case, the Defendant, *Gilbert*, takes a fee in the land devised to him by *Agnes Hatherly*.

Park J. There can be no question that the testatrix intended to dispose of the whole of her property. The rule is clear, that though introductory words will not convey an estate, yet they are of great use to aid the construction, if sufficient words of conveyance appear afterwards. Here it is admitted, that the fee of the property at *Bromehills* did not pass under the clause by which that property is devised; we must therefore refer to the residuary clause, and that is not distinguishable from the clause in *Smith* v. *Coffin*. *Heath* J. says there, "The residuary clause is sufficient to pass the estate in question; for the word *testamentary* is a most comprehensive term, and we should interpret it in much too narrow a sense if we were to confine it to personal property." A more liberal construction than was formerly admitted has obtained in these cases of late years; as, in devises of lands with an imperfect local description. Lord *Hardwicke*, in *Tilley* v. *Simpson* (a), takes this distinction as to the use of the word *estate* — that where it has appeared to be the in-

(a) Cited in *Fletcher* v. *Smiton*, 2 *T. R.* 659.

tention

tention of the testator that it should be so understood, the Court has restrained the word *estate* to carry personal estate only; but when he has used words comprehending all his personal estate, and then makes use of the word *estate*, that it will carry a real estate. In *Timewell* v. *Perkins* he says, "The word estate itself may include as well real as personal," where it is not confined by the testator to things personal. Here, the testatrix gives all her personal, and then her testamentary estate.

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Under these circumstances, and particularly with reference to *Smith* v. *Coffin*, I think there must be judgment for the Defendants.

BURROUGH J. In questions concerning the intentions of a testator, I profess to decide on the will itself, and not on cases cited. Introductory words are of great importance to shew the intention of a testator. If we enquire in what sense the present testatrix used the words *temporal estate and effects*, there can be no doubt that she applied them as well to land as to chattels. No doubt, she meant to give a fee by those very words: but it is immaterial to decide that, because the residuary clause coming after such expressions must be sufficient; and I have no doubt the testatrix applied the expression, *her testamentary estate and effects*, to the same objects as the expression, *her temporal estate and effects*.

RICHARDSON J. I think that a fee passed by the residuary clause; unless it did, the latter part of it must be inoperative. This is the safest construction; especially when what the testatrix meant on the whole will is so apparent. The argument that the word *testamentary* is applicable to chattels only, is answered by reference to the statute of wills. But this

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very testatrix uses the word *testamentary* in the disposition of land.

Judgment for the Defendants.

Nov. 14.

Hookham v. Chambers.

Where a *feme coverte*, separated from her husband by a sentence of divorce, a *mensâ et thoro* was holden to bail while an appeal was still pending against the sentence, the Court, on motion, ordered the bail-bond to be cancelled, the *feme* filing a common appearance.

HULLOCK Serjt. had obtained a rule, calling on the Plaintiff to shew cause why the bail bond in this case should not be delivered up to be cancelled, and the Defendant be permitted to file a common appearance, on the ground that the Defendant was a *feme coverte* when the cause of action arose. The affidavit admitted that she had been divorced a *mensâ et thoro*, but added, that she had appealed against the sentence of the ecclesiastical court, and that the appeal was still pending.

Peake Serjt., who now shewed cause, referred to the early pleas of coverture, to which it had been usual to reply, divorce a *mensâ et thoro*, (*Com. Dig. Abatement*, E. 6. F. 2. H. 42.), and to *Stephens* v. *Tot* (*a*), where the Court held, that a wife divorced a *mensâ et thoro* might sue alone. After citing *Belknap*'s case (*b*), and *Sparrow* v. *Carruthers* (*c*), *De Gaillon* v. *Laigle* (*d*), *Walford* v. *De Pienne* (*e*), *Hopewell* v. *De Pinna* (*f*), he said, the principle deducible from all the cases was, that where a wife was separated from her husband by competent authority, so that he would not be liable to

(*a*) *Moore*, 665.
(*b*) 2 *H.* 4. 7. *a.*
(*c*) 2 *Bl.* 1197., cited in *Ringstead* v. *Langborough*, 1 *Co. B. L.* 33.
(*d*) 1 *B. & P.* 357.
(*e*) 2 *Esp.* 554.
(*f*) 2 *Campb.* 113.

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her debts, the wife herself might be said to be a *feme* sole: here the husband could not be sued, being obliged, as a consequence of the divorce, to allow his wife alimony.

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Sed per Curiam. All the cases cited, except one *nisi prius* case, are anterior to *Marshall* v. *Rutton* (*a*), since which it has always been holden, that a *feme coverte* cannot be sued as a *feme* sole. Besides, here is an appeal pending against the divorce.

Rule absolute.

(*a*) 8 *T.R.* 545.

PARK *v.* TORRE.

Nov. 14.

A writ of *habeas corpus*, returnable the last day but one of the term, having issued for the purpose of charging in execution a prisoner in the custody of the warden of the *Fleet*, the warden omitted to produce him at the return of the writ, or afterwards. On a motion for an attachment against the warden, it appearing that the prisoner had the privilege of the rules; that search had in vain been made for him on the day of the return of the *habeas corpus*; that he was not found till it was too late to conduct him before the Court on the next day, when he was deprived of the rules, and returned to close custody; that before the application for an attachment, he had been discharged, under the insolvent debtors' act, from the action in which it was proposed to charge him in execution by the *habeas corpus*,

The Court discharged the rule for an attachment, on the warden's paying all costs.

VAUGHAN Serjt., on a former day had obtained a rule *nisi* for an attachment against the warden of the *Fleet*, on an affidavit, which alleged that the Defendant having been arrested at the suit of the Plaintiff, was afterwards committed, upon a *habeas corpus*, to the custody of the warden; that final judgment having been obtained in this action, a *habeas corpus* had been sued

out

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out by the Plaintiff, under the seal of the Court, directed to the warden of the *Fleet*, returnable on *Tuesday* next, after three weeks of the *Holy Trinity*, in *Trinity* term last, to satisfy the Plaintiff; that on the 6th *July* last, the writ was delivered to the warden or his deputy, at his office in the *Fleet* prison, and that the warden or his deputy acknowledged the Defendant to be in his custody, and received a fee for returning the writ: that the record of the judgment was brought into court, and that the clerk to the Plaintiff's attorney attended at the return of the writ, (on the 10th *July*,) for the purpose of charging the Defendant in execution, at the suit of the Plaintiff, upon that judgment, and that he then paid the tipstaff the fees for bringing up the Defendant; that the warden did not bring the Defendant before the Court, but requested to be allowed until the following day for that purpose, and that the Plaintiff's attorney and his clerk attended in court until its rising on the following day, but that the warden did not bring the Defendant into court, and by such default the Defendant could not be charged in execution on the said judgment; that the warden had since informed the Plaintiff's attorney that he had granted the Defendant the rules of the prison, and had taken security for his duly keeping the same, and had been prevented obeying the writ, by reason of his officers not being able to find the Defendant within the rules, or elsewhere, from the time he received the same, until after the rising of the Court on the last day of last *Trinity* term; and that the warden had been personally served with notice of the rule.

An affidavit in answer having admitted the receipt of the writ, stated, that, in consequence thereof, one of the turnkeys of the prison was repeatedly sent to the lodgings of the prisoner, (the Defendant,) to desire his attendance, for the purpose of explaining to him

him the nature of the suit, and the necessity of his attendance at the prison on the day of the return, in order that he might be before the Court, in obedience thereto; but that, notwithstanding every possible exertion, the Defendant could not be found till late in the afternoon of the last day of last *Trinity* term; when it was too late to conduct him before the Court; that the Defendant, having deprived the warden of the power of complying with the command of the writ, was deprived of the benefit of the rules, and confined within the walls of the prison, where he continued a prisoner, at the suit of the Plaintiff, until he was from thence discharged, by virtue of an order of the Court for relief of insolvent debtors, as well from the action in quesion, as from all other debts for which he was detained in custody;

Blossett Serjt. now shewed cause against the rule, and contended, that, though strictly speaking, the warden might be liable to the attachment, on the ground of a little remissness, (it not appearing that the utmost search had been made on the day when *Torre* was missing,) yet that the Court would not compel him to pay the debt, *Torre* having returned to prison before any farther proceedings were had, and the Plaintiff having sustained no injury from the want of a due return to the *habeas corpus*, inasmuch as *Torrè* was shortly afterwards discharged under the insolvent act. The privilege of the rules was acknowledged and authorised by the Court, and an action of escape or attachment for not bringing in the body would not lie against the sheriff, in circumstances similar to the present; to sustain such an action, the prisoner must have been seen out of the rules, and the action must have been commenced or the attachment sued out before he surrendered (*Tidd*, 299.

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299. 302., 6th *ed.*) *The King* v. *The Sheriff of Middlesex.* (a)

Vaughan Serjt., in support of his motion, argued, that a prisoner in the rules was as much in the custody of the warden as if within the walls of the *Fleet*; and that the warden could suffer no injury from such a regulation, as he took ample security for the indulgence, and derived a considerable annual sum from the allowance of it. The reason why the action and attachment would not lie in the cases supposed as to the sheriff, was, because the Plaintiff had the prisoner's body at the time of suing out his writ; but he had not the body at the time of the return of the *habeas corpus*, which, in this instance, was the only time to which the Court would look. The warden was bound to obey the writ, and the consequences would be serious if such an answer as was now given should be deemed sufficient.

DALLAS C. J. The warden is undoubtedly bound to obey the writ, or to give a reason for not doing so; and the first question is, whether the reason here given is sufficient; strictly speaking it is not. The only answer is an affidavit, in which the officer informs the Court, that one of the turnkeys was repeatedly sent to the lodgings of the prisoner, to [illegible] attendance, for the purpose of explaining to [illegible]ture of the writ. The turnkey makes no [illegible] shew what degree of diligence he has used to [illegible] the prisoner; if he could not find him at first, he ought to have increased his diligence; this is a very loose way of obeying the writ, which must be more carefully attended to in future.

(a) [illegible] M. & S. 562.

Then,

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Then, as to the consequences, the question is, whether the rule shall be made absolute, and on what terms. With respect to the Plaintiff, as the prisoner took the benefit of the insolvent act, it would have been no advantage had he been returned under the writ: are we then to put the Plaintiff in a better condition than he would have been in case a proper return had been made to the writ? certainly not. But the warden must pay the costs, on the grounds which I have before stated.

Rule discharged, the warden paying all costs attending the application.

HUDSON and Another *v.* HARRISON.

Nov. 20.

Insurance on a cargo of wine, to be discharged partly at *B.*, partly at *D.*, and partly at *L.* The vessel which conveyed the cargo being wrecked near *B.*, and three-fourths of the cargo being either lost or so impregnated with salt water as to render it imprudent to delay the sale till the ports of *D.* or *L.* could be reached, the assured, on the 23d of *December*, the day they heard of the loss, gave notice of abandonment; and, on the 27th of *December*, called a meeting of underwriters, at which three underwriters attended, and ordered the assured to do the best for all parties. On the 28th of the ensuing *February*, and not before, some of the underwriters interfered, forbidding a sale of the damaged wines about to take place at *B.*, and rejecting the abandonment.

Held, that this was a total loss, and entitled the assured to abandon; and that, at all events, the underwriters, not having stirred for more than two months after notice of the abandonment, must be taken to have acquiesced in it.

An insurer, who rejects an abandonment, must do so within a reasonable time.

THIS was an action of *assumpsit* brought by the Plaintiffs, to recover 300*l.* from the Defendant, being the amount of his subscription to a policy of insurance for 7000*l.* on goods, effected in the name of the Plaintiffs, on goods in the ship *Swallow*, on a voyage "at and from the *Cape of Good Hope* to *Bristol*, *Liverpool*, and

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Dublin, all or either, including the risk of craft, at the premium of two and one half guineas *per cent.*; to return 10*s. per cent.* for such part of the interest as might be discharged at her first port." By a memorandum in the policy, the insurance was declared to be "on wines valued at 25*l. per* pipe, and at the same rate for hogsheads." The declaration averred the goods insured to be in the Plaintiffs and *Daniel Dixon*, the sailing of the vessel with the goods insured on board on the voyage insured, and a total loss of the goods by the perils of the sea. The Defendant pleaded the general issue. The cause was tried before *Dallas* C. J. and a special jury, on the 17th of *February*, 1821, at the *London* sittings, when the jury found a verdict for the Plaintiffs, damages 300*l.*, subject to the opinion of the Court, on a case, of which the following is the substance.

The Plaintiffs are partners with *Daniel Dixon*, at the *Cape of Good Hope*, under the firm of *Thomas Hudson, Dixon*, and *Co.*, and they are also partners in *London*, under the firm of *Thomas Hudson, Donaldson*, and Co. On the 31st of *August*, 1819, *Daniel Dixon*, in the name of his firm, entered into a charter-party, under seal, at the *Cape of Good Hope*, with *John Phillips*, master of the *Swallow*, by which the vessel was hired to take a cargo of wine for a voyage from the *Cape of Good Hope* to *Bristol*, for orders from the Plaintiffs; and having there unloaded such part of the cargo as they should direct, she was to proceed to the ports of *Liverpool, Dublin*, or *Cork*, or any two of them the Plaintiffs might direct, and discharge the remainder; and upon the delivery of the cargo, freight was to be paid at each port, in certain proportions mentioned in the charter-party. On the 25th *September*, 1819, *Daniel Dixon* shipped at the *Cape*, on board the *Swallow*, the wine in question,

which

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which consisted of 241 pipes and 71 half pipes, or hogsheads of *Cape* wine, the property of, and on the account and risk of himself and the Plaintiffs, and of the value, according to the invoice price of 7,947*l*., of which he advised the Plaintiffs by letter, in consequence of which letter the policy in question was effected. The *Swallow*, with the wines insured, sailed from the *Cape*, on the 9th *October*, 1819, and in the night of the 21st *December* following, was driven, by a gale of wind, on the rocks near *Portishead*, about 13 miles from *Bristol*, and soon afterwards fell over on her side. On the 23d *December*, the Plaintiffs in *London* heard of the vessel being on shore, and the same day gave notice of abandonment to the Defendant and the other underwriters to the policy. On the 22d *December*, the master of the *Swallow* went to *Bristol*, and applied to Messrs. *Alexander*, merchants and ship-agents there, who were unknown to the Plaintiffs and the underwriters, for their assistance, desiring them to do their best for all concerned. Messrs. *Alexander* engaged lighters and craft to bring the cargo to *Bristol*, on the 22d *December*; 11 casks were taken out of the vessel, and a hole was cut in her side, through which the remainder of the cargo was removed into lighters on the six following days, and taken to *Bristol*. The tide rises at *Portishead* near 40 feet, and at high water the whole of the cargo was nearly covered with the sea, and the greatest part remained under water for about nine hours, between flood and flood; and, when part had been removed, the residue floated in the vessel. The wines saved consisted of 229 pipes and 67 hogsheads; 71 pipes and 43 hogsheads were sound and full; 44 pipes and six hogsheads were impregnated with salt water; 17 pipes and four hogsheads were quite empty; the others had either partially leaked, or were affected more or less

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with salt water; but, in the opinion of some of the witnesses, were merchantable. The vessel was afterwards floated to *Bristol*, and, being incapable of repair, her materials were sold. The Plaintiffs had intended to land 100 pipes of the wine at *Bristol*, and to send the residue to *Dublin*; but no offer was made by the master or owner of the *Swallow*, to forward the remainder to *Dublin*. The Plaintiffs called a meeting of the underwriters for the 27th *December*, at *Lloyd's* Coffee-house, *London*, at which only three of them attended, and they authorised the Plaintiffs to send a person to *Bristol*, at the expense of the underwriters, to superintend the preservation of the cargo, and to act, in every respect, as if there had been no insurance: the Plaintiffs accordingly sent a person to *Bristol* for that purpose. The Defendant did not attend this meeting. The wines saved were placed by Messrs. *Alexander* in vaults under the king's locks.

After the survey, Messrs. *Alexander*, without any authority from the Plaintiffs or the underwriters, but acting for the benefit of all concerned, advertised the wines for sale by auction at *Bristol*, on the 1st *March*, 1820, on account of the underwriters, of which they gave a month's notice in the country newspapers and in the Public Ledger at *London*. On the 28th *February*, Messrs. *Alexander* received a letter from the attornies of the Defendant, dated *London*, the 26th *February*, stating that they had been consulted by several of the underwriters on the *Swallow*, and noticing the advertisement for the sale; and, that no misunderstanding or prejudice might thereafter arise on that subject, they informed Messrs. *A.* that the underwriters did not sanction the sale, but denied any right of sale by which their interest could be affected; they denied, that any right of abandonment existed in the insured, saying, that, should any of the wines have

have been lost or damaged by any peril insured against, the underwriters would be ready to pay such loss; that, if any of the wines were not in their port of destination, the underwriters required the same to be forwarded, and would be ready to pay any expenses or charges properly incurred, to which they might be liable under the policy. A number of persons from different parts of the country had assembled at the time and place of sale, but in consequence of this letter it was postponed.

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On the 17th *March*, 1820, the attorney for the Plaintiffs wrote to the attornies for the Defendant, proposing that the wines should be sold, without prejudice to any of the questions which had been made, or that might thereafter arise on the part of the insured or the underwriters. No answer having been returned to this letter, the Plaintiffs, on the 1st *April*, 1820, wrote to Messrs. *Alexander*, requesting, that they would sell the wines on account of the concerned, and that they would incur no expenses but such as were necessary. The wines were sold by auction at *Bristol*, on the 24th *April*, 1820, and produced the sum of 4044*l.* 2*s.* 6*d.*, which was received by Messrs. *Alexander*. From this gross produce, they deducted the charges which they had paid for taking the cargo out of the vessel, removing it to *Bristol*, landing and warehousing it, also the charges of the sale by auction, and their commission of 5 *per* cent. on the proceeds: and the master and owner of the *Swallow* having claimed the freight, primage, and port charges upon the wines which were conveyed to *Bristol* from the wreck, at the rate stipulated in the charter-party, for such part of the cargo as should be discharged there, Messrs. *Alexander* retained 460*l.* 12*s.* 6*d.*, to answer that claim. By these deductions, the net proceeds of the sale were reduced to 2570*l.* 16*s.* 3*d.*, which, with the

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freight, primage, and port charges, remained in the hands of Messrs. *Alexander*, to be paid to the party entitled to receive them. The witnesses for both parties were of opinion, that it was best, for the interest of all concerned, to sell a cargo so circumstanced by public auction at *Bristol*, and that every thing was done for obtaining the best price for the wines. The question for the opinion of the Court was, whether, upon the facts stated, the Plaintiffs were entitled to recover a total loss, with benefit of salvage to the underwriters. If the Court should be of opinion that the Plaintiffs were entitled to recover as for a total loss, then the verdict was to stand; but if the Court should be of a contrary opinion, then it was to be referred to an arbitrator, to determine the average loss, subject to any directions which the Court might give thereupon.

Hullock Serjt., for the Plaintiffs. This was a total loss; the assured had a right to abandon at the time of the abandonment, and this right was confirmed, not divested, by subsequent circumstances. From the doctrine laid down by Lord *Mansfield*, in *Goss* v. *Withers* (*a*), *Milles* v. *Fletcher* (*b*), and *Hamilton* v. *Mendes* (*c*), confirmed by the decision of *Manning* v. *Newnham* (*d*), it appears, that an assured may abandon, if there be such an interruption as defeats the voyage, or renders it not worth pursuing. This doctrine has been recognised by Lord *Ellenborough*, in *Anderson* v. *Royal Exchange Assurance* (*e*), and *Wilson* v. *Royal Exchange Assurance* (*f*); and though some late cases may seem to have narrowed it, in all such cases the decision has turned on the circumstance that the voyage was worth pursuing, the goods

(*a*) 2 *Burr.* 697.
(*b*) *Dougl.* 230.
(*c*) 2 *Burr.* 1198.
(*d*) *Park Ins.* 260.
(*e*) 7 *East*, 42.
(*f*) 2 *Campb. N. P. C.* 623.

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having been of an imperishable nature, or that it did not appear that the voyage could not have been pursued, as in *Bainbridge* v. *Neilson* (*a*), *Thompson* v. *Royal Exchange Assurance* (*b*), *Anderson* v. *Wallis* (*c*), *Patterson* v. *Ritchie* (*d*), *Hunt* v. *Royal Exchange Assurance* (*e*): in the latter case, the language of the Court shews, that the decision would be otherwise, where the goods are of a perishable nature. In *Thompson* v. *Royal Exchange Assurance*, there was a clause excepting the underwriters from particular average. In the present instance, three fourths of the cargo was lost or damaged in such a way, that it would have been injurious to the owners to have sent it on, inasmuch as the wine affected by salt water would become worse every day. In *Buller* v. *Christie* (*f*) the loss was holden to be total, because the ship never arrived, though a much larger proportion of the cargo remained uninjured. At all events, the insurers having taken no steps to repudiate the abandonment till two months after they received notice, and three of them, after a public meeting was called, having ordered the Plaintiffs to do the best, must be taken to have acquiesced, and cannot now resist the Plaintiffs' demand.

Taddy Serjt., for the Defendant. Here was no total loss, a considerable proportion of the casks having been saved; nor was the cargo in such a state as to warrant an abandonment, 71 pipes and 43 hogsheads remaining uninjured; but if it was, the Plaintiffs, under the subsequent circumstances, cannot recover for a total loss, a policy of insurance being only a contract for indemnity, under which the Plaintiff can claim no more than

(*a*) 10 *East*, 329.
(*b*) 16 *East*, 214.
(*c*) 2 *M. & S.* 240.
(*d*) 4 *M. & S.* 393.
(*e*) 5 *M. & S.* 47.
(*f*) 2 *M. & S.* 374.

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he has actually been deprived of. *Patterson* v. *Ritchie.* Unless this principle be resorted to, continual difficulty must be experienced on the question, whether the loss in any case is total or partial, and what degree of loss shall be esteemed total; a point on which the customs of various nations and the opinions of text writers have always differed; some requiring a loss of the whole subject matter of insurance, as under the old *French* law; others, only three-fourths, as in the new *Code de Commerce*, *Pothier*, 186. It is, therefore, that in *Falkner* v. *Ritchie* (*a*), Lord *Ellenborough* complains of the looseness and generality of the expressions in *Goss* v. *Withers. Manning* v. *Newnham* turned on the point, that the voyage could not be pursued (there being no ship at *Tortola*), not on the ground that it was not worth pursuing. Here, part of the cargo having been saved and landed at the port of *Bristol*, a ship might have been procured, and the voyage might and ought to have been pursued. What happened was not a total loss of cargo, but a retardation of the voyage. In many instances, a greater proportion of the cargo has been lost than in the present, and yet the loss has not been deemed total; as in *Glennie* v. *London Assurance* (*b*), *Thompson* v. *Royal Exchange Assurance*, *Wilson* v. *Royal Exchange Assurance.* As to the meeting of the underwriters, only three attended it, and they could not bind the others.

Hullock, in reply, observed, that in *Glennie* v. *London Assurance*, there was no abandonment; and in *Falkner* v. *Ritchie*, the recapture was known to the insured before the abandonment was made.

DALLAS C. J. Under what circumstances, generally speaking, the assured has a right to abandon, so as

(*a*) 2 *M.* & *S.* 290 (*b*) 2 *M.* & *S.* 371.

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to state a rule applicable to all cases, is a question of extensive importance and difficult consideration; and this appears from the variety of opinions in the text writers, and the number of cases that have been decided on the subject. That he has in some cases a right to abandon, is clear; and also, that in case of abandonment after a capture, the abandonment is superseded if the ship be recaptured and pursues her voyage beneficially. As this is a case where the ship has been lost, and the cargo materially damaged, is the assured bound to send on the goods taken from the wreck; and if so, in what proportion is he bound to send them on? Is he to send only when half is saved, or a third, or a quarter? Is he bound to send them on at all events, or only under certain circumstances? That the rule on this subject differs is clear from the various text writers; some stating it at a fourth, some at a third, and some at a half; we must therefore act on the custom of the country in which the loss happens. I own I long thought, that, if the profits were reduced one half, it was not incumbent on the owner to prosecute his voyage; whether or no that doctrine (which may be collected from some expressions of Lord *Mansfield*) be sound, or whether the observations made on it by Lord *Ellenborough* be just, we are not driven now to decide. My opinion is formed on the circumstances of this particular case, and I wish distinctly to be understood, as not laying down a rule for any other; because, in a system of such importance, and where there is such an apparent conflict among the cases, I should be sorry to afford a ground for further doubt, by laying down the rule too generally. But the circumstances of this case do not require that I should do so. What are the facts of this case? The ship was completely lost; the cargo, which was taken out of a hole cut in the ship's side, was covered with the sea for nine hours at a time, the greater part of

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it was materially damaged, and in such a state as to render it unfit to be carried to a greater distance. Only 71 pipes and 43 hogsheads were sound, and the assured had originally intended to dispose of 100 pipes at the port near which the loss happened. The assured immediately gave notice of abandonment, and called a meeting of the underwriters, which three of them attended, and authorised the Plaintiffs to act for the benefit of all concerned, taking no other step till after an interval of two months. That the captain acted for the benefit of all concerned is clear, from the testimony of all the witnesses; but, though he did act for the benefit of all concerned, if the insurer has a right to insist on a legal objection, he must have the benefit of that objection. But has he such right in this case, or has he been bound by his own acts or the acts of others? the law is, that the assured shall abandon in reasonable time, that he may not lie by to see whether it may be more to his interest not to abandon; he must, therefore, in reasonable time, (and what is reasonable time is a matter of law for the decision of the Court) give notice of abandonment. What is reasonable time in each case, must depend on circumstances. When the loss happens in a foreign country, there are no means of giving immediate notice here: if notice be given there, the agent for all parties there must act as beneficially as he can for all. But if the loss happen in this country, and notice of abandonment be duly given, from that moment it becomes the duty of the underwriters to send down an agent to do his best. Here, the earliest notice of abandonment was given; but if the law were to compel the assured to give the earliest notice of abandonment, and at the same time allow the underwriters to lie by and afterwards refuse to accept it, there would be no mutuality of obligation between them. The question, therefore, is, whether the underwriters, by lying by in the present instance,

instance, have not induced the assured to believe that the abandonment was acquiesced in. Here, the notice was given in *December*, the insurers were called together, and, after having done nothing during nearly three months, they interpose just before the sale takes place. Where there are circumstances to shew an acquiescence, it is not allowable for the underwriters, after such an acquiescence, to come forward and interpose. I think there was such an acquiescence here. If it were necessary, I might go farther, and say the cargo was so damaged and reduced as to render the loss total; but, on the ground of the underwriters having acquiesced in the abandonment, and narrowing my decision to the circumstances of the present case, I think the Plaintiffs are entitled to judgment.

PARK J. I am of opinion this was a total loss. After what has fallen from my Lord Chief Justice, it is not necessary for me to go into the whole case, but I may be permitted to doubt whether it is necessary to narrow the old rule respecting abandonment; and I think that some of the cases on that subject cannot be supported to their full extent. I, for one, have never been able to comprehend the case of *Falkner* v. *Ritchie*, which I have the less hesitation in avowing, inasmuch as the Lord Chancellor and Lord *Redesdale* have expressed themselves to labour under the same difficulty. But *Hunt* v. *The Royal Exchange* I think to the purpose for the case before us, especially in the arguments of the Judges; the cargo, there, being of an imperishable nature, the Court confined themselves to treating it as a case of retardation only; but Lord *Ellenborough* said " If indeed the cargo had been of a perishable nature, this would not have been a case of retardation only, but of destruction of the thing insured."

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As to the point relied on in the present case by my Lord Chief Justice; the underwriters, having never repudiated the abandonment till the end of *February*, must be taken to have acquiesced in it. It being clear that the assured must, if he abandon, immediately elect to do so, it is but fair that the underwriter should also, as soon as may be, make his election. If the underwriter says he will not accept the abandonment, the assured may elect to proceed for a total loss, or continue his voyage; and where there is an obligation on one side, there ought also to be one on the other. In one stage of *Smith* v. *Robertson* (*a*), in the House of Lords, the Lord Chancellor evidently felt such dissatisfaction at the decisions of *Bainbridge* v. *Neilson* and *Falkner* v. *Ritchie*, that he wished to have the point argued before the twelve Judges. *Smith* v. *Robertson* was afterwards decided upon a collateral point, and it became unnecessary to give any opinion on *Bainbridge* v. *Neilson* and *Falkner* v. *Ritchie*. But the Lord Chancellor said (*b*) "An election might, it was contended, be made in these cases, to abandon or to take the chance of recapture, and claim for a partial loss. But here, they said, they had made their election, and that this was founded on their right to do so; and that, at the time they claimed, they had the right, because a present demand could not properly be made without a present right; and that if there was a present right, there was a corresponding obligation to accede to it *de præsenti*;" evidently shewing, that he thought that the underwriter should say, at the earliest opportunity, whether he will accept the abandonment or not. On a subsequent day, his Lordship said, in the same case, that the underwriters could not be allowed to say that the

(*a*) 2 *Dow.* 474. (*b*) *Ibid.* 479.

loss

loss was not total, after they had admitted, that it was, and acquiesced in the abandonment as for a total loss. Upon the same principle, I am of opinion that here is enough to satisfy the Court, that there was an acquiescence or silence on the part of the underwriters, which admits that the assured were acting in the best way for the interests of all; and I am of opinion, that this acquiescence has completed the right of abandonment.

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BURROUGH J. Most of the cases connected with the subject of insurance depend on their own particular facts. It is admitted that, if the loss here was in its nature total, the assured have a right to recover. I think the loss was in its nature total. The ship was wrecked, and the greater part of the cargo damaged and under water for nine hours at a time. Did the loss continue total? The Plaintiffs abandoned on the 23d of *December*, and gave the underwriters notice, that is, they insisted on a total loss, and followed it up in the best way they could. The Defendant, having never interposed during all this time, must be taken to have accredited what the Plaintiffs did. A meeting of the underwriters was called, and if this was not the usual way of proceeding, it should have been so stated in the case. A certain number of them attended; and my opinion is, that the Defendant was bound by what was done upon that occasion. The underwriters who attended authorised the Plaintiffs to send a person to *Bristol*, at the expense of the underwriters, to superintend the preservation of the cargo, and to act in every respect, as if there had been no insurance. As this part of the case stands, it is as much as to say that the policy was at an end.—The case then goes on, " and the Plaintiffs accordingly sent a person to *Bristol* for that purpose." Under these circumstances matters went

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went on a considerable time, and till the 28th of *February*, there was not a word of objection on the part of the Defendant; a notice to countermand the sale of the damaged wines was then sent, after the sale had been advertised, and when all opportunity of forwarding the wines with advantage by another vessel was lost to the Plaintiffs.

This case does not trench on any former decision, but depends on its own circumstances, and clearly entitles the Plaintiffs to recover for a total loss. If the underwriters meant otherwise, they should have acted otherwise; as they have acted, they must be taken to have acquiesced in the abandonment

RICHARDSON J. I think this was such a loss as gave the assured a right to abandon, that subsequent circumstances have not taken away that right, and that therefore the Plaintiffs must recover. In *Mitchell* v. *Edie* (a), *Ashhurst* J. and *Buller* J. expressed an opinion, that, where a voyage is lost, but the property is saved, the owner may abandon. In *Manning* v. *Newnham*, the same opinion is expressed. That doctrine, perhaps, is not carried so far now; it is not every loss of voyage that will justify an abandonment; — a retardation is not sufficient; but that there may be losses of voyage which will justify an abandonment, is admitted in the last case of *Hunt* v. *The Royal Exchange*, and that too by those Judges who had most contributed to narrow the former doctrine. It seems to me, that the present is a loss of voyage of that description. What are the facts? The ship is thrown on her side, exposed to the operation of wind and tide; at high tide full of water, her cargo floating within, it being uncertain whether or no it might not perish the next hour. The abandonment was then made under circumstances which

(a) 1 T. R. 615

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fully warranted it. Endeavours were made, at a great expense, to save part of the cargo, but in the result, it appears, that three fourths of the whole cargo was spoiled or lost; and, in the opinion of all the witnesses, it was for the interest of all parties to finish the adventure at *Bristol*. This was a total loss of voyage; and, though there was a partial recovery of one fourth of the cargo, the facts being such as rendered it prudent for the owners not to proceed further, this was a loss which warranted the notice of abandonment. It is material, that that part of the cargo which was damaged by the salt water must have become worse by delay, and consequently by carriage on to *Ireland*. I also agree, that, if the underwriters intended to resist the abandonment, they should have taken that step with more promptitude, instead of waiting two months.

Judgment for the Plaintiffs.

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Nov. 27.

DAVISON *v.* M'KIBBEN.

A vessel trading to and from *London* to *Belfast*, and proceeding down the *Thames* on her voyage to the latter port, not laden with corn, grain, meal, flour, bread, or biscuits, is not within the second section of the 52 *G.* 3. *c.* 29., which exempts from the obligation of taking a *Trinity House* pilot on board, all coasting vessels, and all *Irish* traders using the navigation of the *Thames* as coasters.

DEBT on the pilot act. (*a*) The declaration contained two counts; one for assuming, and the other for continuing in, the charge and conduct of a ship or vessel proceeding down the river *Thames*, without being duly licensed so to act, after a pilot duly licensed and qualified had offered to take charge of her. Plea, general issue. At the trial, before *Dallas* C. J. (*Westminster* sittings after *Hilary* term last) a verdict was found for the Plaintiff, for a penalty of 20*l.*, subject to the opinion of the Court, upon the following case.

By the stat. 46 *Geo.* 3. *c.* 97. *s.* 2., it is enacted, that every person exporting corn, grain, meal, flour, bread, or biscuits, from *Great Britain* to *Ireland*, or from *Ireland* to *Great Britain*, shall declare before the collector, comptroller, or other chief officer of the customs at the port from whence the exportation is about to take place, that such corn, &c. is intended to be exported to *Great Britain* or *Ireland*, as the case may be; and such exporter shall thereupon receive the like cocket, certificate, let, pass, or transire, as is given and conformable to all the like regulations in force, and in case of goods sent coastwise from one port of *Great Britain* to another port therein, or from one port in *Ireland* to another port in *Ireland*.

The *Levant*, the ship in question, during the last eight years, had been employed as a trader between *Belfast* and *London*, except one voyage, when she went to *Liverpool*. On the 13th *April*, 1821, she was proceeding down the river *Thames*,

(*a*) 52 *Geo.* 3. *c.* 29. *s.* 34.

bound

bound for *Belfast*, being laden with a general cargo of tea, sugar, seeds, wearing apparel, &c., but not with corn, grain, meal, flour, bread, or biscuits. The Defendant was then master of the ship, and refused to allow a licensed pilot to take charge of her. There are two offices in the custom-house at which ships report and clear out, the *foreign* office and the *coasting* office. The *[illegible]* cleared out at the *foreign* office. A clerk from the custom-house stated, that she would have reported or cleared out in the same manner, had she been loaded with corn. Whether a ship shall report or clear out at the foreign office or coasting office, does not depend upon the cargo she carries, but the place from or to which she is bound. The same clerk treated all *Irish* vessels as foreign. *Irish* vessels pay a dock duty.

If the Court should be of opinion that this vessel did not, under the circumstances above stated, fall within the saving clause contained in the second section of the pilot act, (52 *Geo.* 3.) which exempts from the obligation of taking a *Trinity-House* pilot on board all *coasting* vessels and all *Irish* traders using the navigation of the river *Thames as coasters*, then the verdict was to stand; if not, a nonsuit was to be entered.

The case was argued on a former day in this term.

Lens Serjt., for the Plaintiff. "This vessel was not a coaster within the meaning of the act of parliament on which this action is brought. A coaster is a vessel which goes from port to port in *Great Britain*, and which, being never absent in foreign parts, may be supposed to have so constant a knowledge of those ports as not to require a pilot. That vessels coming from *Ireland* to the *Thames* are not considered coasters by the legislature, appears clearly from the provisions of

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46 *Geo.* 3. *c.* 97. *s.* 2., for there, in order to favour the corn trade, vessels coming from *Ireland* to the *Thames* with a cargo of corn, are allowed the privileges of coasters; but such an enactment would have been superfluous, if vessels coming from *Ireland* to the *Thames* generally, were deemed coasters.

Vaughan Serjt., for the Defendant. The question arises solely on the construction of the statute 52 *Geo.* 3. *c.* 39., and the statute 46 *Geo.* 3. applies to a different matter. The object of the legislature was, to guard against the damage which might arise from unskilful persons navigating the river *Thames*, and many vessels, which, from the shortness of their voyages, may be supposed to frequent the *Thames* as much as coasters, are allowed the privilege of navigating the river without a pilot; as colliers, vessels trading to *Norway*, the *Cattegat*, and *Baltic*, all *constant* traders inwards, from the ports between *Boulogne* inclusive, and the *Baltic*, and others; all which are merely specified as examples, and not as defining the limits of the privilege. So that vessels trading regularly from *Ireland*, and, therefore, using the river five or six times a year, must be deemed to fall within the same principle. Besides which, this is a penal statute, which the Court will not construe with severity.

Lens, in reply, observed, that the statute was rather remedial than penal, being intended to prevent the mischiefs which had before arisen from the want of a skilful pilot, in a river so crowded as the *Thames*.

DALLAS C. J. My present impression is, that this vessel was not a coaster within the meaning of the 52 *Geo.* 3., and that trading from *Ireland* to *Great Britain* is not, in the ordinary sense of the word, coasting.

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ing. In order to see whether a vessel trading from *Great Britain* to *Ireland*, or from *Ireland* to *Great Britain*, comes within the meaning affixed by the legislature to the term coaster, we must see what is the meaning given to the word in other acts of parliament, as in the 31 *Geo.* 3. *c.* 39., and 46 *Geo.* 3. *c.* 97. It seems clear, from the language of those acts, that by "coasters," are meant, vessels trading from and to any port or place or ports and places in *Great Britain*, or from one port of *Great Britain* to another port therein, or from one port in *Ireland* to another port in *Ireland*, and, therefore, speaking at the moment, I think this was not a coasting vessel. If not protected as a coaster by the 52 *Geo.* 3., is she within the protection of the 46 *Geo.* 3.? The protection of that statute seems not to be afforded, on account of the employment of a vessel in a particular voyage, but on account of her conveying a particular cargo. Some little difficulty arises with me on the expressions of the 52 *Geo.* 3.; and as "all *Irish* vessels using the *Thames* as coasters," are mentioned in the second section of that statute, I should have thought, had it not been for expressions in the other statute, that the exemption was applied by reason of the employment, and not by reason of the particular cargo, especially when the "using the *Thames* as coasters," seems contrasted with the using it as strangers or as foreign vessels. But the 46 *Geo.* 3. is positive as to the cargo, and will not admit of this construction.

PARK J. of the same opinion.

BURROUGH J. I have great doubts on the subject. There is no reason why a vessel frequenting the *Thames*, as this vessel did, should employ a pilot; the principle being, that foreign vessels should be piloted, but not vessels, the crews of which, from frequent navigation, must be

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supposed to know the river. It is not necessary they should be coasters; it is sufficient if they use the *Thames* *as* coasters; and no other certain meaning can be affixed to the words "*as* coasters."

RICHARDSON J. declined expressing any opinion, as the case was to undergo consideration.

DALLAS C. J. afterwards said that the case might be considered as decided.

And now, the Court awarded

Judgment for the Plaintiff.

Nov. 21.

FULLER *v.* ABRAHAMS.

Held, that a purchaser did not acquire any property under a sale by auction at which he and his friend were the only bidders, the rest of the company being deterred from bidding by the purchaser's stating to them he had a claim against, and had been ill used by, the late owner of the article.

A BARGE being put up for sale by auction, the Plaintiff addressed the company present, saying, he had a claim against the late owner, by whom he said he had been ill used; whereupon no one offered to bid against the Plaintiff. The auctioneer refusing to knock down the barge to the Plaintiff's single bidding, a friend of the Plaintiff's bade a guinea more, and the Plaintiff then made a second and higher bidding, amounting, however, to only one-fourth of the prime cost of the barge. The auctioneer, being indemnified by the vendor, who had taken the barge in execution, refused to deliver the barge to the Plaintiff, and he, having sued for the barge in trover, the foregoing facts were proved at the trial, before *Dallas* C. J., *London* sittings after *Hilary* term, 1821, when his Lordship charged the jury, that there was no legal sale under the circumstances. The jury, however, found for the Plaintiff.

A rule *nisi* for a new trial having been obtained on a former day,

Pell

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Pell Serjt. now shewed cause against the rule, contending, that this was a case peculiarly within the province of the jury, and that no fraud had been proved.

The Court, however, being clearly of opinion that a sale under these circumstances could not be supported, made the

Rule absolute.

HOUSE *v.* The Treasurer to the Commissioners of the Navigation of the Rivers THAMES and ISIS.

Nov. 22.

Trespass in some named and some unnamed closes of the Plaintiff, and also for taking his goods and chattels. Pleas: 1st, not guilty, to the whole declaration; 2dly, as to part, a special plea of license; 3dly and 4thly, as to part, certain special pleas, on which the jury were, by consent, discharged from giving any verdict; 5thly, as to the unnamed closes, *lib. ten.* The replication took issue on the plea of not guilty, traversed the license mentioned in the 2d plea, and also new assigned on that plea; and, as to the unnamed closes, contained a *nolle prosequi.* The rejoinder took issue on the traverse, judgment was suffered by default on the new assignment, and the cause went down to trial, as well to try the issues joined, as to assess the Plaintiff's damages on the new assignment. The jury found for the Plaintiff on the general issue (without any damages); for the Defendant, on the plea of license; and assessed to the Plaintiff, on the new assignment, one shilling damages and one shilling costs: Held, that the Plaintiff was entitled to the general costs of the cause, including those of the trial, the costs of the issue found for the Defendant being deducted, but no costs being allowed to the Defendant on that issue.

THIS case, the facts and arguments in which are sufficiently stated in the following judgment of the Court, which was now delivered, was argued in *Trinity* term last, by *Peake* Serjt. for the Plaintiff, and *Lawes* Serjt. for the Defendants, when the cases of *Thornton* v. *Williamson* (a), *Compere* v. *Hicks* (b), *Martin* v. *Val-*

(a) 13 *East*, 191. (b) 7 *T. R.* 727.

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lance (a), *Brooke* v. *Willet* (b), *Day* v. *Hanks* (c), *Griffiths* v. *Davies* (d), *Postan* v. *Stanway* (e), and *Trotman* v. *Holder* (f), were cited.

Dallas C. J. The Plaintiff has obtained a rule, calling on the Defendant to shew cause why one of the prothonotaries of this court should not tax the Plaintiff his full costs of this cause, deducting therefrom the costs on the issue found for the Defendant, but not allowing the Defendant any costs on that issue.

This is an action of trespass, for trespasses charged to have been committed by the commissioners in some named and some unnamed closes of the Plaintiff, and also for seizing and taking his goods and chattels. The Defendant pleaded, 1st, not guilty to the whole declaration; 2dly, as to part, a special plea of licence; and, 3dly and 4thly, as to part, certain special pleas, on which the jury have, by consent, been discharged from giving any verdict; and, 5thly, as to the un-named closes, *liberum tenementum*.

The Plaintiff, by his replication, took issue on the plea of not guilty; traversed the license mentioned in the 2d plea, and also new-assigned on that plea; and as to the un-named closes, entered a *nolle prosequi*.

The Defendant, by his rejoinder, took issue on the traverse, and suffered judgment by default on the new assignment; and the cause went to the assizes, as well to try the issues joined, as to assess the Plaintiff's damages on the new assignment.

At the trial the jury found a verdict for the Plaintiff on the general issue (without assessing thereon any damages)

(a) 1 *East*, 350.
(b) 2 *H. Bl.* 435. *Hullock on Costs*, 112.
(c) 3 *T. R.* 654. *Hull.* 374.
(d) 8 *T. R.* 466. *Hull.* 376.
(e) 5 *East*, 261. *Hull.* 369.
(f) *Ante*, I. 222.

mages) for the Defendant, on the plea of license; and on the new assignment, they assessed to the Plaintiff one shilling damages and one shilling costs.

The rules established by *Postan* v. *Stanway* (a), *Trotman* v. *Holder* (b), and other cases on the one part, and by *Day* v. *Hanks* (c), *Griffiths* v. *Davies* (d), and other cases on the other part, seem to amount to this; that where the Plaintiff's demand is altogether denied by the Defendant's pleas, and at the trial the Plaintiff obtains a verdict for part of his demand, and the Defendant obtains a verdict as to other part, the Plaintiff is entitled to the costs of the issues found for him, which include the general costs of the trial, but do not include the costs of the issues found for the Defendant, on which last mentioned issues, however, the Defendant is not entitled to claim any costs from the Plaintiff; but where the Defendant suffers judgment by default as to part of the Plaintiff's demand, and pleads only as to other part, and the Plaintiff takes issues on the pleas, and at the trial *all* the issues are found for the Defendant, there the Defendant is entitled to the costs of the issues found for him, and the Plaintiff is entitled only to the costs of the judgment by default.

It seems to us, that the present case falls within the former of those rules; for here the Defendant, by pleading the general issue to the whole declaration, made it necessary for the Plaintiff, in order to get rid of that plea, which would otherwise have barred his whole action, to go to trial at the assizes, and he could not by any other means have obtained damages or costs on the judgment by default; the Plaintiff, therefore, having obtained a verdict on the plea of the general issue, and on assessment of damages on the judgment by default,

(a) 5 *East*, 261.
(b) *Ante*, I. 222.
(c) 3 *T. R.* 654.
(d) 8 *T. R.* 466.

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is entitled to the general costs of the cause, including those of the trial, the costs of the issue found for the Defendant being deducted, but no costs being allowed to the Defendant on that issue.

In this case, the learned Judge certified, under the statute (*a*), that the trespass whereof the Defendant was found guilty was wilfully and maliciously committed by him. It has been argued on behalf of the Defendant, that this certificate cannot avail, because the statute, it is said, does not apply to trespasses confessed by a judgment by default, but only to such whereof the Defendant is found guilty at the trial: and although this Defendant has been found guilty on the general issue; yet that, it is said, will not avail, because no damages have been assessed under that issue. On this point we consider it unnecessary to give any opinion, because, independently of the certificate, we think that the Plaintiff is entitled to the costs of the trial, being the only mode by which, in conequence of the Defendant's pleading, he could obtain an assessment of damages on the judgment by default.

(*a*) 8 & 9 *W.* 3. *c.* 11. *s.* 4.

1821.

HENRY MACHIN and MARY VESSEY v. ELIZABETH REYNOLDS.

Nov. 22.

Bequest of personalty to testator's sister and nephew during their joint lives,

THE following case was directed, by His Honour the Vice-Chancellor, to be sent for the opinion of this Court.

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share and share alike, and to the survivor for life, *in case there should happen to be no issue living of them, or either of them; but in case both, or either, should leave any issue,* to the survivor of the said sister or nephew one moiety of the personalty for his or her life, the other moiety, or such part of the same as should be thought needful by the executor of the party dying and leaving issue, to be applied to the maintenance and education of all and every the child and children of the party so dying, during the respective minorities of such child or children; and after the death of the survivor of the said sister and nephew, the survivor's moiety in the personalty, or such part thereof as should be thought necessary by the executor of such survivor, to be applied to the maintenance and education of all and every the child and children of such survivor, during their respective minorities, and *when and as* such several children of the said sister and nephew (if there should be any) should respectively attain their age of 21, the whole of the said personalty unto and equally amongst all of them, share and share alike, and if but one, then to such only child: the persons who eventually should have the payment of the shares to have due regard to the expenditure of the children during their minorities, in order to the division of the property being made as equal as possible. But if the nephew only should have issue living at the time of the death of survivor of sister and nephew, the property was to be divided among all his children, in such shares as he by will should appoint; and in default of such will, equally among all such children. If the sister and nephew should both die without leaving issue, the property was given to such person or persons, in such shares as the survivor of sister and nephew should by will appoint; and in default thereof, to testator's personal representatives.

Then followed a devise of real estate to the sister and nephew for their joint lives, and to the survivor for his or her life, *in case there should be no issue living of them, or either of them; but in case both, or either of them, should leave any issue,* then to the survivor of the sister and nephew one undivided moiety of the real estate for his or her life; the rents and profits of the other undivided moiety to be applied to all and every the child and children of either of them (the sister and nephew) so dying, during their several minorities, if there should be occasion for it, in like manner as was directed regarding the personal estate; and after the death of the survivor of the sister and nephew, the remaining moiety of the rents and profits of the real estate was to be applied in like manner, if there should be occasion, to all and every the child and children of such survivor, during their several minorities; and *when and as* such several children of the sister and nephew (if any such there should be) should respectively attain their age of 21 the whole of the real estate was given unto

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and equally amongst all such children, share and share alike, if more than one, as tenants in common, and to their respective heirs and assigns, for ever; and in case the sister and nephew should both die without leaving, or, there being issue, they should die under 21 without issue, the real estate was given to *G. M.*

Held, that under this will, a child of the nephew, the only issue of nephew or niece alive at the death of the devisor, took, at the death of the devisor, a vested estate in fee simple in remainder in the devisor's real property, subject to be devested in part by the birth of other children of the nephew or niece or either of them, and determinable altogether in the event of such child dying in the lifetime of the nephew, or under age without issue.

John Vessey was, in his lifetime and at the time of his death, possessed of considerable personal property, and seised of an undivided third part, in certain messuages, lands, tenements, and hereditaments called *Upper Hexgrove Farm*, in the parish of *Southwell*, in the county of *Nottingham*, by virtue of an indenture of demise, dated the 22d *September*, 1798, whereby the said messuages, lands, tenements, and hereditaments were demised to him and two other persons therein named, their heirs and assigns; to hold to them, their heirs and assigns, as tenants in common, during the lives of the persons therein named. Livery of seisin was endorsed upon the deed.

John Vessey, by his will, after various specific and pecuniary legacies, gave all the residue of his personal estate and effects, of what nature and kind soever, as follows; the interest, dividends, and proceeds arising from such residue, to his sister, *Mary Vessey*, and his nephew, *Henry Machin*, during their joint lives, to be equally divided between them, share and share alike, to and for their respective use and benefit, and to the survivor of them, during her or his life, in case there should happen to be no issue living, lawfully begotten of them or either of them; but, in case both or either of them should leave any such issue, then to the survivor of them, the said sister and nephew one moiety or half-part only of the interest, dividends, and proceeds of the residue of the personal estate, for and during his or her life; the other moiety or half-part thereof, or such part of the same as should be thought needful, by the executors or administrators of either of them, so dying and leaving issue as aforesaid, to be paid and applied for and towards the maintenance, education, and bringing up of all and every the child and children of such of them the said sister or nephew so dying during their

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several and respective minorities; and from and after the death of the survivor of them, the said sister and nephew, the other moiety or half-part of the interest, dividends, and proceeds, or such part thereof as should be thought proper by the executors or administrators of such survivor of them the said sister and nephew, to be applied in like manner, for and towards the maintenance, and bringing up of all and every the child and children of such survivor, during their several and respective minorities; and when and as such several children of the said sister and nephew (if any such there should happen to be) should respectively attain their age of 21 years, then the whole of the residue of the said personal estate, unto and equally amongst all such children of the said sister and nephew, share and share alike; and if but one, then to such only child: the person or persons who eventually should have the payment of the above shares to have due regard to the expenditure on such several and respective children during their minorities, in order to the division of the said personal estate being made as equal as possible amongst them; but if it should happen that the said nephew only should have issue living at the time of the death of the survivor of them the said sister and nephew, then such residue of the said personal estate, was to be paid in like manner, unto and amongst all his children, in such parts, shares, and proportions, manner and form, as he should by his last will direct and appoint: and in default of such will, the residue of the personal estate was bequeathed unto and equally amongst all such children of the said nephew; provided, that in case the said sister and nephew both died, without leaving any lawful issue of her or his body living, then the whole of the residue of the said personal estate was given to such person or persons, and in such parts, shares, and proportions, manner and form, as the said sister and nephew should by will appoint; and in default thereof, to the testator's representatives

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presentatives. All and every the testator's real estate whatsoever and wheresoever was given and devised unto the testator's said sister and his said nephew for and during the term of their joint natural lives, and to the survivor of them two, during her or his life, in case there should happen to be no issue, living, lawfully begotten of them or either of them; but in case both or either of them should leave any such issue, then to the survivor of them the said sister and nephew, one undivided moiety or half-part only of the said real estate, for and during his or her life; and the rents and profits of the other undivided moiety of the said real estate, were to be paid and applied unto all and every the child and children of either of them, the said sister and nephew, so dying during their several minorities, if their should be occasion for it, in like manner as was thereinbefore directed, regarding the interest and proceeds of the personal estate; and from and after the death of such survivor of the said sister and nephew, the remaining half-part of the said real estate was to be paid and applied in like manner, if there should be occasion, unto all and every the child and children of such survivor of the said sister and nephew, during their several minorities; and when and as such several children of the said sister and nephew respectively, if any such there should happen to be, should respectively attain their age of 21 years, then the whole of the said real estate was given unto and equally amongst all such children of the said sister and nephew respectively, share and share alike, if more than one, as tenants in common, and to their several and respective heirs and assigns for ever; and if but one, to such only child, his or her heirs and assigns for ever; and in case the said sister and nephew should both happen to die, without leaving lawful issue of her or his body, or there being such, they should happen to die

die under the age of 21 years, and without issue, then all and every the said real estate was given unto *George Moseley*, of *Farnsfield*, farmer, his heirs and assigns for ever. The testator appointed his said sister, *Mary Vessey*, and his nephew, *Henry Machin*, executrix and executor of his will. 1821. MACHIN v. REYNOLDS.

The testator died on the 3d day of *February*, 1819, without having revoked or altered his will. *Henry Machin* and *Mary Vessey* (who remains unmarried) are his coheirs at law. *Henry Machin*, at the death of the testator, had a daughter, *Elizabeth Susannah*, who was then and is now his only child. On the 10th *October*, 1820, *Henry Machin* and *Mary Vessey* made an agreement in writing with the Defendant, *Elizabeth Reynolds*, whereby *Henry Machin* and *Mary Vessey* agreed to sell, and the said *Elizabeth Reynolds* agreed to purchase the said undivided third part of the said messuages, lands, tenements, and hereditaments devised by the will of the said *John Vessey*; and *Henry Machin* and *Mary Vessey* were, by the said agreement, bound to make a good title to the premises, and convey the same to the said *Elizabeth Reynolds*. In order to make title to the said hereditaments, *Henry Machin* and *Mary Vessey*, paying a compensation therefore, obtained of *George Mosely*, by an indenture, dated on or about the 20th *January*, 1821, a release of all his interest or possibility under the testator's will; and by certain indentures of lease and release, bearing date respectively the 21st and 22d days of *January*, 1821, and made between the said *Henry Machin* and *Mary Vessey*, of the one part, and *Robert Swan*, therein described of the other part, reciting, among other things, the said indenture of demise for lives, and the will and death of the said *John Vessey*, leaving the said *Henry Machin* and *Mary Vessey* his coheirs at law, and further reciting, that, for the purpose of destroying the contingent remainders expectant on the

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the life estates of the said *Henry Machin* and *Mary Vessey* of and in the third part of the messuages, lands, and hereditaments comprised in the said indenture of demise, and given and demised by the said will of the said *John Vessey*, by merger of the said life estates of the said *Henry Machin* and *Mary Vessey*, in their reversionary estate or interests of and in the same third part, as heirs at law of the said *John Vessey*: It was witnessed, that, in pursuance and performance of the said agreement, and upon such consideration as were therein mentioned, the said *Henry Machin* and *Mary Vessey*, and each of them, granted, bargained, sold, released, and confirmed, unto the said *Robert Swan*, his heirs and assigns (in his possession then being, by virtue of a lease for a year, as therein mentioned), the said undivided third part or share, late of the said *John Vessey*, of and in the said messuages, lands, and hereditaments comprised in the said indenture of demise, to hold the same unto the said *Robert Swan*, his heirs and assigns, for and during the natural lives of the persons named as *cestui que vies*, in the said indenture of demise, and the survivor of them, freed and discharged of and from all the contingent interest given and devised, in and by the said will of the said *John Vessey*, to the uses and upon the trusts therein limited, expressed, and declared, of and concerning the same, that is to say, (amongst others) to such uses and upon such trusts, and for such ends and purposes, and with, under, and subject to such powers, provisions, declarations, and agreements, as the said *Henry Machin* and *Mary Vessey*, at any time or times, and from time to time jointly, during their joint lives, by any deed or deeds executed as therein was provided, should jointly direct, limit, and appoint; and in default thereof, upon such further uses and trusts, for the benefit of the said *Henry Machin* and *Mary Vessey* respectively, as therein were mentioned.

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The questions for the opinion of the Court were, first, whether *Elizabeth Susannah Machin*, the daughter of *Henry Machin*, took any and what estate in the said undivided third part of the messuages, lands, tenements, and hereditaments comprised in the indenture of demise, upon the death of the said *John Vessey*, and under his said will.

Second, whether the said *Robert Swan*, *Henry Machin*, and *Mary Vessey* respectively, took any and what estates, interests, or rights respectively, in the said messuages, lands, tenements, and hereditaments, under the said deeds, dated respectively the 21st and 22d of *January*, 1821.

Hullock Serjt., for the Plaintiffs. The daughter of *Henry Machin* took only a contingent remainder in the devisor's real property, under the will of the devisor. The devisor's intention, as it may be collected from various expressions in the will, was, that none of the limitations over should take effect till the death of his sister or nephew. There are many cases which decide, that when the expressions "*leaving issue*," or "*leaving* heirs of her body," are employed, the issue intended are only those who shall be living at the death of the party who is to leave them. *Forth* v. *Chapman* (a), *Read* v. *Snell*. (b) So the expression "*when and as*," applied to the period of a party's coming of age, has been holden to mean, that nothing shall vest till that time. A legacy to *A. B. when he is* of *such an age*, lapses, if he dies before the age indicated. The present will may be considered in two divisions; that which relates to the personalty and that which relates to the realty, though the expressions are nearly alike in both. In that part which relates to the per-

(a) 1 *Peere Wms.* 664. 2 *Eq. Ca. Ab.* 292. *pl.* 16. 359. *pl.* 15.

(b) 2 *Atk.* 646.

sonalty,

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sonalty, the property is bequeathed to the sister and nephew and to the survivor of them, *in case* there should happen to be no issue of either of them living; but in case either of them should *leave* any issue, then, in certain proportions to such issue. So, as to the realty, the limitation over is, *in case* either of them shall *leave* any issue. That can only mean such issue as should be living at the death of the party. Then, as it could not be ascertained before hand who would or would not be living at the death of the sister or nephew, the remainders over, depending on an uncertainty, were clearly contingent; and as such, were destroyed by the conveyance of the 21st and 22d of *January*, 1821, the freehold interest on which they were supported, having thereby ceased. What estates *Robert Swan*, *Henry Machin*, and *Mary Vessey*, respectively take by that conveyance, depends on the determination of the question touching the remainders in the will.

Pell Serjt., for the Defendant. The daughter of *Henry Machin*, the devisor's nephew, takes a vested remainder in the devisor's real property, subject to the life interest of her father and aunt, subject to the fund for the maintenance of children, and subject to open and admit to participation, after-born children. This is the intention of the testator, to be collected from the whole will; he meant the children of his nephew and sister, to take at the deaths of the nephew and sister, and to take equally, which they would not do if the remainders were holden to be contingent, as the nephew and niece might then bar them, for want of a supporting freehold. The expression *when and as* does not fix the time of a contingency, but points out when a vested interest shall fall into possession. *Boraston*'s case. (*a*) *Goodtitle* v. *Whitby*. (*b*) *Doe*

(*a*) 3 *Rep*. 19. (*b*) 1 *Burr*. 228.

v. *Lea*.

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v. *Lea.* (a) The law favours vested interests, and if there are any words to effect the testator's intentions, they must receive a liberal construction. *Ives* v. *Legge.* (b) As to the cases touching the expression "*leaving* issue," they were, like all other cases on wills, decided on the particular instrument, and cannot be safely applied to the construction of any other. According to the definition of *Willes* C. J. in *Parkhurst* v. *Smith* (c), there are but two sorts of contingent remainders, and the circumstances on which the present remainders are supposed to depend (namely the number of children that may be living at the death of the nephew and sister) will not render a remainder contingent within that rule.

Hullock, in reply, urged, that the greatest inequality in the division of the property might ensue, if these remainders were holden to be vested; for if one or more of the children should die, the share of the parties so dying would go to an elder brother, who might thus obtain eleven twelfths of the whole property, while another brother had only one twelfth; that the rule touching contingent remainders, laid down by *Willes* C. J., had always been deemed too narrow, and that the number of children who might be living at the death of a parent, was clearly laid down by *Fearn* as one of the circumstances which might render a remainder contingent.

The following certificate was afterwards sent. This case has been argued before us by counsel. We have considered it, and are of opinion, that *Elizabeth Susannah Machin*, the daughter of *Henry Machin*, took, upon the

(a) 3 *T. R.* 41.
(b) 3 *T. R.* 488., in note.
(c) *Willes*, 338.

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death of the said *John Vessey*, and under his will, an estate in fee simple in remainder, during the lives of the *cestui que vies*, in the undivided third part of the messuages, lands, tenements, and hereditaments, comprised in the said indenture of demise, subject to be devested in part, by the birth of other children of the said *Henry Machin* and *Mary Vessey*, or of either of them, and determinable altogether in the event of her dying in the lifetime of the said *Henry Machin*, or under the age of twenty-one, without leaving issue.

Second, That the said *Robert Swan*, *Henry Machin*, and *Mary Vessey*, did not, nor did either of them, take any estate, interest, or right under the said deeds of the 21st and 22d of *January*, 1821, which can in any way defeat or affect the remainder, which we conceive to have been vested in the said *Elizabeth Susannah Machin*, as aforesaid.

R. DALLAS.
J. A. PARK.
J. BURROUGH.
J. RICHARDSON.

Nov. 23.

KELLY *v.* CLUBBE.

Debt will not lie during the life of the annuitant, for the arrears of an annuity for life issuing out of lands, though the declaration avoids stating that the grantor had a freehold in the lands, and alleges that he received the rents of the lands to the use of the grantee.

THE plaintiff declared in *debt*, for the arrears of an annuity granted by the Defendant to the Plaintiff's wife, for life; the declaration alleging, that by an indenture between the Defendant of the first part, and

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one *Sarah Clubbe* of the second part, (which said *Sarah* had since intermarried with, and was then the wife of the Plaintiff,) and one *John Jeyes* of the other part, the Defendant, for the considerations therein stated, did grant unto the said *Sarah* and her assigns, during the term of her natural life, a certain annuity, annual sum or rent charge of 200*l.* to be yearly issuing, payable, and going out of certain premises in the said indenture particularly mentioned: that, after the making of the indenture, and after the Plaintiff's marriage with the said *Sarah*, and during her life, to wit, on the 25th *March*, 1821, 200*l.* for four quarterly payments of the said annuity or rent charge, which ended and expired on the day and year aforesaid, became, and was due, owing and payable, and still was in arrear and unpaid, contrary to the effect of the indenture and the Defendant's covenant: and that the Defendant, during the term in which the arrears had accrued, and since the said intermarriage of the plaintiff, had received the rents and profits of the premises to the use of the Plaintiff, whereby, &c. Then followed the common money counts. Demurrer and joinder.

Hullock Serjt., for the Defendant, was stopped by the Court, who called on

Onslow Serjt., for the Plaintiff, asking him if he could distinguish this case from *Webb* v. *Jiggs*. (*a*) *Onslow* said, in that case the grantor of the annuity was alleged to be seised in fee of the lands on which the annuity was charged, and though it was clear, that debt would not lie during the life of the annuitant, for the arrears of an annuity for life, issuing out of a freehold, yet there was no such decision with respect to annuities charged on

(*a*) 4 *M.* & *S.* 113.

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terms for years; that there was nothing unusual in granting an annuity for life out of a long term for years, as out of a term for 500 years; and that it did not appear on the declaration, that the Defendant had a freehold in the premises charged with the annuity, or indeed, that he had not merely a term for years; that, if it would have appeared by the indenture referred to, that the Defendant had a freehold in the premises in question, the Defendant ought to have set it out on oyer; and that, at all events, debt would lie on the allegation, that the Defendant had received the rents and profits of the premises to the use of the Plaintiff.

But the Court thinking, that this case was not to be distinguished in principle from *Webb* v. *Jiggs*; that it must be taken, the grantor had a fee in the premises when nothing to the contrary appeared, and that the circumstance of the grantee's taking a freehold, was of itself sufficient to bar the action, they gave

Judgment for the Defendant.

Nov. 24.

GOSS v. WATLINGTON.

Entries made by a deceased collector of taxes in a public book, handed down to him by his predecessor in office, and afterwards delivered to his successor, are evidence against his surety, in an action on a bond conditioned for the due performance of the collector's duty, and the delivery up of the books kept by him in his office.

Quære, Whether the receipts signed by such collector, for monies payable to him in his official capacity, are evidence against his surety in such case.

THE Defendant had suffered judgment by default in an action of debt on bond. After reciting that one *Thomas Watts* had lately been elected and chosen the beadle of the ward of *Queenhithe*, in the city of *London*, and that, in order to secure the payment of all taxes, rates,

duties,

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duties, and other assessments which he might, by virtue of such office, be at any time appointed to collect and receive, unto the Plaintiff, the deputy of the ward, he the said *Thomas Watts* and the said Defendant had agreed to enter into the above-written obligation, the condition of the bond stated in the declaration, was, "that if the said *Thomas Watts* did and should well and faithfully collect and receive the watch-rate, and the several taxes, duties, and assessments which he then was or should or might thereafter be appointed or employed to collect or receive by the Plaintiff, as such deputy as aforesaid, and also did and should well and truly pay or cause to be paid the same watch-rate, taxes, duties, and assessments, and every part thereof respectively, unto the Plaintiff, his executors or administrators, or unto his or their order, upon demand, from time to time, when and as soon and as often as the same, or any part thereof respectively, should be received by him the said *Thomas Watts*, deducting only the customary allowance or poundage for the collection thereof; and also did and should, from time to time and at all times, so long and as often as the said *Thomas Watts* should continue or be appointed or employed as collector or receiver as aforesaid, diligently and faithfully employ and apply himself in and about the collecting and receiving of the said watch-rate, and all other duties and assessments; and also, if he the said *Thomas Watts*, his executors or administrators, should, at any time when thereunto required by the said Plaintiff, his executors or administrators, render and give unto him or them a full, true, distinct, and perfect account, in writing, of such his employment, collection, and receipt, and deliver up to him or them all the books and accounts entrusted to his care as collector or receiver, or as beadle as aforesaid; and did and should, in all respects, well and faithfully de-

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mean and conduct himself in the execution of his duty or appointment or employment as aforesaid, then the bond should be void and of no effect, otherwise the same should be and remain in full force and virtue." Breach, that although *Thomas Watts*, after the making of the bond and condition, and before the commencement of that suit, by virtue of his said office of beadle as aforesaid, did receive and collect the watch-rate, and several other duties, taxes, and assessments, which he was appointed and employed to collect and receive by the said Plaintiff, as such beadle as aforesaid, to the amount of 100*l.*, after deducting the customary allowance or poundage for the collection thereof; and although *Thomas Watts* afterwards was demanded and required to pay over to the said Plaintiff, according to the condition of the bond, the said sum of 100*l.*, so collected and received by him, he refused to do so.

On a writ of inquiry, executed before *Dallas* C. J., at the *London* sittings after *Trinity* term last, with a view of proving the amount of the sums received by *Watts*, certain books were produced, which had been delivered to him from his predecessor in the office of collector or receiver of the watch-rates, &c., and which, on his decease, were handed over to his successor. These books contained the names of the parishioners charged with the watch-rates, and opposite to the name of each parishioner was the sum at which he was assessed. Many of the names were ticked off; that is, a mark was made at the side of them, by which mark *Watts* indicated that he had received the sum assessed to those names. Receipts, signed by *Watts*, for monies paid to him in his official capacity, were also produced. The counsel for the Defendant having objected

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jected to the admission of these books or receipts as evidence against the Defendant, damages to the amount of the penalty of the bond were assessed for the Plaintiff; with leave to the Defendant to reduce them, in case the Court should be of opinion that the evidence ought to have been rejected.

Pell Serjt., accordingly, moved to this effect on a former day, contending, that though the entries in the books, or the receipts, might have been good evidence against *Watts*, they were not evidence against third persons. First, as being evidence not on oath; secondly, as not being the best evidence, since the parties who paid the money might themselves have been called. He said such evidence had been rejected in *Cutler* v. *Newlin.* (*a*)

Vaughan and *Peake*, Serjts., now shewed cause against the rule. This would have been evidence against *Watts*, and, if so, it is equally evidence against the Defendant, for admissions by one of several obligors are evidence against a co-obligor. They are privies in interest, and where several have entered into a contract, the declarations of one will bind the other. *Whitcomb* v. *Whiting* (*b*), *Brockman*'s case (*c*). *Vicary*'s case (*d*), *Grant* v. *Jackson* (*e*). *Wood* v. *Braddick* (*f*). On the same principle admissions by rated inhabitants of a parish have been admitted as evidence touching the settlement of a pauper. *Rex* v. *Hardwick* (*g*) and *Rex*. v. *Whitley Lower* (*h*). Then *Watts*, if alive, might, in this action, have been called to prove what he had received,

(*a*) *Manning's Digest, Evid. Privies.*
(*b*) *Dougl.* 652.
(*c*) *Gilbert. Evid.* 47., 6th ed.
(*d*) *Id.* 51.
(*e*) *Peake, N. P. C.* 203.
(*f*) 1 *Taunt.* 104.
(*g*) 11 *East*, 578.
(*h*) 1 *M. & S.* 636.

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and the entrics of a party deceased, if made against his own interest, are admissible where he might have been called if alive. *Higham* v. *Ridgway* (*a*), *Harrison* v. *Blades* (*b*), *Barry* v. *Bebbington* (*c*), *Doe, Lessee of Reece*, v. *Robson* (*d*). In Lord *Torrington*'s case (*e*), the entries of a person living were admitted, on the ground that they constituted part of the *res gesta*; and so do the entries and receipts in the present case. In an action against the sheriff for an escape, the declarations of the original Defendant may be given in evidence. [*Richardson J.* That is on the ground, that the sheriff, by his conduct, substitutes himself for the original Defendant.] In *Perchard* v. *Tindall* (*f*), evidence of this description was admitted, and it is impossible that any inconvenience could result from such a course, inasmuch as the receiver would never make entries against his own interest. *Peake* also cited *Brett* v. *Levett*. (*g*)

Pell, in support of his rule. The cases of partners and privies in interest do not apply, inasmuch as the Defendant had no interest whatever in common with *Watts*; and cases of sureties are cases *strictisimi juris*, favoured in law. Entries of deceased persons have been admitted to prove, not the truth of the entries themselves, but some other fact with which they were connected. The point now in dispute did not come distinctly before Lord *Ellenborough* in *Harrison* v. *Blades*; and Lord *Torrington*'s case turned on the course of trade. In no case has the receipt of the principal been admitted as evidence against his surety when the party who paid the money could be called, unless where the

(*a*) 10 *East*, 109.
(*b*) *Phillips*, 269. 3 *Campb.* 457.
(*c*) 4 *T.R.* 514.
(*d*) 15 *East*, 32.
(*e*) 1 *Salk.* 285.
(*f*) 1 *Esp.* 394.
(*g*) 13 *East*, 213.

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agent had authority to represent his principal. The rules of evidence are the land-marks of property and the safeguards of life, both of which might be endangered, if evidence such as that which is contended for in the present case, were admitted against third persons.

Cur. adv. vult.

Dallas C. J. now delivered judgment. This case has been much argued at the bar, and much on topics which seem to have no very close application to the subject. The Court, at least, will decide on a very narrow ground, It is a principle clearly established, that whatever a party says, either in civil or criminal cases, is evidence against himself; but in a variety of instances it is not evidence against others. The entries in these books are in the nature of a declaration of the party; but the present proceeding is not against the party, but against his surety; and therefore the question will be, first, whether the book in which the principal charged himself be or be not evidence against his surety; and then, whether the receipts of the principal for money paid to him in the execution of his office, be also evidence against the surety. And here it is necessary to advert to the situation of the parties. The Defendant was surety for one who was dead at the time the action was brought, and who had been collector of the watch-rates and other taxes in the parish in which he lived. The condition of the bond on which the Defendant is sued, is, that *Thomas Watts* should diligently and faithfully employ himself about the collecting and receiving the watch-rate and all other duties and assessments, and should, at any time when required by the Plaintiff, render a perfect account in writing of his collection and receipt, and should deliver up all the books and accounts entrusted

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entrusted to his care as collector or receiver. It is clear, therefore, that the Defendant's obligation is, among other things, for the due delivery of these books, which are referred to in the condition of the bond, as public books, (it being there stated that they were entrusted to him, and are to be delivered over to his successor) and thereby become evidence against him. On this ground, we think that the marks made by *Watts* ticking off the persons assessed, are, as an entry in a public book, evidence against the surety in this case.

On the other point in the case, whether the receipts signed by the principal are evidence against the surety, more doubt has existed. Not that I agree in the assertion made at the bar, that in no case can the receipt of a principal be evidence against his surety. There might be an authority actually given which would justify the reception of such evidence; there might be an authority implied from the circumstances of the case. In *Biggs* v. *Lawrence* (a), the receipt of an agent was admitted as evidence against his principal. Lord *Kenyon*, it is said (b), afterwards ruled to the contrary. In many cases there may be a doubt whether an agent has or has not power to bind his principal; but I do not accede to the doctrine, that in no case is the receipt of the agent evidence. It is sufficient that there is not enough in the circumstances of the present case to admit the receipts of *Watts* against his surety. But as we decide that the books are evidence, this becomes less material.

Judgment for the Plaintiff.

(a) 3 *T. R.* 454.
(b) By counsel, in *Bauerman* v. *Radenius*, 7 *T. R.* 665.

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Orr v. Morice and Others.

Nov. 26.

The Defendants, assignees of a bankrupt, produced, under a notice from the Plaintiff (in an action for use and occupation), the deed of assignment of the bankrupt's effects: Held, that the deed was admissible in evidence, though not proved by the attesting witness, it having been shown that the Defendants occupied under the deed.

ASSUMPSIT for use and occupation. The Defendants were the assignees of a bankrupt, and at the trial before *Dallas* C. J. (*Middlesex* sittings after *Trinity* * term last,) it was proved, that one of them had continued for some time after the bankruptcy to occupy a counting house, which, up to his bankruptcy, had been occupied by the bankrupt.

The Defendants, under a notice from the Plaintiff, produced the deed of assignment, and the Plaintiff, omitting to prove its execution by the attesting witness, it was contended, that the deed was not admissible in evidence.

Dallas C. J., held, that the assignment so produced was admissible, as coming out of the possession of the Defendants, who had taken a beneficial interest under it. A verdict having been found for the Plaintiff,

Hullock Serjt., on a former day, obtained a rule *nisi* to set aside this verdict, and enter a nonsuit, on the ground, that the Plaintiff ought to have proved the deed by calling the attesting witness.

Pell Serjt., who shewed cause against the rule, cited *Pearce* v. *Hooper* (*a*), and contended, that the Defendants taking a beneficial interest under a deed in their own custody, must be thereby deemed to admit its due execution.

(*a*) 3 *Taunt.* 60.

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Hullock Serjt., in support of his rule, referred to *Gordon* v. *Secretan* (*a*), *Johnson* v. *Lewellin* (*b*), and *Wetherston* v. *Edgington* (*c*), as having overruled *Rex* v. *Middlezoy* (*d*) where it was holden, that a deed coming out of the hands of the opposite party, after notice to produce it, must *primâ facie* be taken to be duly executed, and must be received in evidence without proof of the execution; and he distinguished the present case from *Pearce* v. *Hooper*, inasmuch as the Defendants did not take an interest for their own benefit. He urged, that the Court should not go further in qualifying the strict rule as to the proof of deeds; a rule established on sound principles, and productive of no surprise or inconvenience, inasmuch as the party calling for the production of a deed, might, under a rule of court or a judge's order, obtain a sight of it beforehand, and learn the name of the subscribing witness in time enough to produce him. (*e*)

DALLAS C. J. The cases on this subject have been contradictory; the earlier cases laying down a rule, which, on first consideration, I should have thought correct, namely, that when an adverse party, who has a deed in his custody, produces it on notice, it shall be deemed to be duly executed, and the party calling for it, shall not be required to prove the execution by calling an attesting witness. That rule indeed proceeded on the ground, (which subsequent practice has in some degree removed,) that the party calling for the deed could not be supposed to know the name of the attesting witness. Then came the case of *Gordon* v. *Secretan*, by which that doctrine was expressly overruled, and,

(*a*) 8 *East*, 548.
(*b*) 6 *Esp.* 101.
(*c*) 2 *Campb.* 94.
(*d*) 2 *T. R.* 41.
(*e*) See the note to *Wetherston* v *Edgington*, 2 *Campb.* 95.

wherein

wherein the party calling for the deed, was held bound to prove its execution, as in every other case. After that, followed the case of *Pearce* v. *Hooper*, in which it was decided, that where an adverse party produces, upon notice to do so, an instrument under which he claims a beneficial estate, the party calling for the deed shall not be compelled to prove its execution by the testimony of the attesting witness; and in another case at *nisi prius*, in which the circumstances were of the same nature, I remember having ruled to the same effect. The question then will be, whether, in the present instance, the assignees did claim a beneficial interest under the instrument which they were called on to produce? As to that, it appeared that the bankrupt had claimed the premises in question, that his assignees had entered, and had occupied them for some time. This brings the case within the rule laid down in *Pearce* v. *Hooper*, and I think it was not incumbent on the plaintiff to call the attesting witness of the deed produced by the Defendants under these circumstances.

PARK J. Whether the rule in *Rex* v. *Middlezoy* was right or wrong, I do not say; but the rule laid down by Lord *Kenyon*, general and unqualified as it was, I know produced great inconvenience, and I have myself frequently seen Plaintiffs most cruelly nonsuited under the operation of that rule. Perhaps great inconvenience might ensue from taking the rule generally, either way; but it has been properly restricted by the decision in *Pearce* v. *Hooper*, and it is no longer necessary, where the party producing the deed or notice, takes a beneficial interest under it, that the party calling for the deed should bring forward the attesting witness. I think it sufficiently clear in the present instance, that the Defendants took such an interest under the deed, and

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and that, therefore, it was not necessary to call the attesting witness.

BURROUGH J. I remember a case prior to *Rex* v. *Middlezoy*, in which the decision is to the same effect, and I think that affords the soundest rule; for under the other rule, the party who has the deed, frequently defeats his opponent by producing it; a hardship which presses heavily on the party who calls for the deed. In this case, however, there can be no question, because the assignees take an interest on the face of the deed, and I think it was very properly admitted.

RICHARDSON J. It cannot be understood now, that a party who produces a deed or notice, is therefore to be held as admitting it to be conclusive against him. In many cases, he may contend the very contrary; as in the case of *Gordon* v. *Secretan*; or in the case of an heir who disputes a deed or will, or where a deed or will is fraudulent. But, on the other hand, there are cases like *Pearce* v. *Hooper*, where a party who produces a deed must be taken to admit its due execution, as where he takes a benefical interest under it. This case is not so strong as that of *Pearce* v. *Hooper*, but is sufficiently so to justify the admission of the deed without calling the attesting witness. The Defendants are assignees of a bankrupt; they occupy a counting-house which had been rented by the bankrupt; and, upon notice to do so, they produce at the trial, in an action for use and occupation, the deed by which the bankrupt's property is assigned to them. This is an instrument under which they claim an interest, and their case falls within the rule which has been laid down touching the production of deeds under which the party producing them takes a beneficial interest.

Rule discharged.

1821.

STEVENS and Another, Assignees of MITCHELL, a Bankrupt, *v.* ROTHWELL and Another, Sheriff of MIDDLESEX.

Nov. 26.

A sheriff, who levies under a *levari facias* for a crown debt, is not entitled to poundage under the statute 29 *Eliz. c.* 4., and, consequently, an action against him under that act, for extortion in such a case, is misconceived.

THIS was an action on the 29th of *Eliz. c.* 4., against the sheriff of *Middlesex* for extortion. At the trial before *Dallas* C. J. (*Middlesex* sittings after *Trinity* term, 1821,) it appeared that the sheriff's officers, (who were employed to levy under a *levari facias*, a debt due from *Mitchell* to the crown,) had, at his request, allowed time for dividing his effects into lots, in order that they might sell to greater advantage: for the expences of a man employed to keep possession during the time so allowed, a small remuneration had been demanded and received.

It was objected among other things at the trial, first, that this being a levy for a crown debt, the sheriff was not entitled to poundage under 29 *Eliz. c.* 4., and that an action for extortion did not lie on that statute, but that the party's remedy, if any, was on the 3 *Geo.* 1. *c.* 15., secondly, that the remuneration, having been received for something done out of the course of official duty, was not an extortion within the meaning of either statute. A verdict having been found for the Plaintiffs, with liberty for the Defendants to move to set it aside and enter a nonsuit, and

Vaughan Serjt., on a former day having obtained a rule *nisi* to this effect, on the ground above stated,

Pell Serjt., now shewed cause against the rule, arguing from the words of the statute of *Elizabeth*, that the sheriff was entitled to poundage on a *levari* for a crown debt, and consequently liable to this action, the statute

giving

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giving poundage on all writs of extent or execution, and a *levari facias* being in the nature of an extent, and at all events an execution. He cited *Jones's Index to the Exchequer Records*, title *Sheriff*, to shew, that, between the time of the passing of the statute of *Elizabeth* and that of *George* 1st, it had always been usual for the Court of Exchequer to issue orders for poundage on these writs; from whence he inferred, that the statute of *George* 1st was merely cumulative: he also observed, that in *Deacon* v. *Morris* (a), which was an action on the statute of *Elizabeth*, and in which there had also been a levy for a crown debt under a *levari*, the present objection was not started by the Court or counsel.

Vaughan, *contrà*, was stopped by the Court.

DALLAS C. J. It is not necessary for us to decide, whether or no the facts proved in this case, amount to extortion on the part of the sheriff. Generally speaking, extortion is the taking by colour of office more than the officer is entitled to, or the party bound to pay; in other words, taking more than ought to be charged for the performance of the official duty. Here, the facts are widely different; it was no part of the officer's duty to bestow his time in dividing into lots the bankrupt's effects for the convenience of the bankrupt. If it were necessary, therefore, to give an opinion, whether or no this was extortion, I should think it was not; but it being unnecessary, I give no opinion on that part of the case. The ground of my decision is shortly this; the statute of *Elizabeth*, on which this action is framed, applies only to cases between party and party. Before and after that statute passed, orders were issued from the exchequer, from time to time, which regulated what the sheriff should be

(a) 2 *B.* & *A.* 393.

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permitted to claim, clearly shewing, that he was not entitled to claim any thing under the statute of *Elizabeth*, for, if he had been so entitled, there would have been no necessity for issuing the orders in question. Then came the statute of 3 *Geo.* 1., which is applicable to cases where the debt is due to the crown, and gives the sheriff poundage in those cases, in which he was not before entitled to it, or, at least, very doubtfully. I am, therefore of opinion, that at all events, the proceeding ought to have been on the latter statute, and not on the former.

PARK J. I am of the same opinion. I have not very fully considered, whether or no the facts of this case amount to extortion, though I incline to think not; but it is not necessary for me to give an opinion on that point, because it is clear, that the sheriff was not entitled to poundage, as a matter of right on execution for crown debts, previously to the statute of *Geo.* 1st. The statute of *Elizabeth* applied only to cases between party and party; and therefore, when the crown debt was large, the sheriff applied to the Court for relief, and the Court made orders from time to time, which would never have been done if the sheriff had been entitled under the statute of *Elizabeth*. That is a strong argument in support of the Defendant's case. Then came the statute of *Geo.* 1st, which mentions and distinguishes the different writs: and even by that statute, the poundage is not to be taken out of the effects of the party, but out of the crown debt: the statute then gives a remedy to the party aggrieved; not by action of debt as under the statute of *Elizabeth*, but by a compulsory process from the Court of Exchequer. In *Deacon* v. *Morris*, the only question before the Court was, as to the treble costs, and the point now

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in dispute was not even adverted to. I am therefore of opinion, that in this case a nonsuit must be entered.

BURROUGH J. I give no opinion whether this action would have been maintainable, even if the case were within the statute of *Elizabeth*; though, if it had been necessary, I should probably have holden, that this was not extortion under the circumstances. As to the other points, I agree in the construction put by the Court on the statute of *Geo.* 1st. It appears to demonstration, that the sheriff had no right to poundage for a *levari* at the suit of the crown, under the statute of *Elizabeth*; he acquired a right to it under the statute of *Geo.* 1st, and parties aggrieved must now pursue that statute.

RICHARDSON J. This action is misconceived on the statute of *Elizabeth*, which does not apply to crown debts, but only to cases between party and party. Prior to the statute of *Geo.* 1st, the sheriff was entitled to nothing, except under orders from the Court.

The language of the Court in *Peacock* v. *Harris* (a), shews that the Judges thought the statute of *Elizabeth* applied only to cases between party and party. I think, therefore, the Defendant is entitled to a

Rule absolute.

(a) *Salk.* 331.

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Nov. 27.

Insurance for 8000*l.* on ship *Vittoria*, and 4000*l.* on freight, at and from *London* to the *East Indies* and back. The ship sailed seaworthy from *Calcutta* on her voyage home, when, in addition to some damage which she sustained in the river *Hooghly*, she encountered two storms at sea, by which she was so shattered as to render it necessary for the captain to put back; and he returned to *Calcutta* on the 30th of *August*, 1820. On his arrival at *Calcutta*, he gave notice of abandonment to the agents for *Lloyd's*, resident there, and requested that their surveyor might be present at the surveys of the ship. The agents said they had no authority to accept the abandonment; but their surveyor attended the surveys, when it was found that the ship was so seriously damaged that the expense of repairing her would be nearly 5000*l.* The agents refused to undertake the repairs; and the captain, having in vain attempted to borrow money for that purpose by hypothecation of ship, sold the ship for 1200*l.*, conceiving that to be the best course for all parties. On the 25th of *April*, 1821, the captain arrived in *London*, where the owner resided; and, on the 3d of *May*, the ship's papers were delivered. On the 5th of *May*, the ship's broker abandoned to the underwriters.

In an action on the policy on ship, the jury having found a verdict for the Plaintiff as for a total loss, and that the captain had sold the ship for a justifiable cause, the Court (*dissentiente Richardson J.*) refused to grant a new trial, which was moved for, on the ground that the ship ought not to have been sold, and that notice of abandonment had not been given in due time.

ASSUMPSIT on a policy of insurance on the ship *Vittoria*, at and from *London* to the *East Indies* and back. The ship was insured at 8000*l.*, and the freight to the amount of 4000*l.* more. At the trial before *Dallas* C. J., at the *London* sittings after *Trinity* term last, it appeared that the ship having sailed from *England* staunch and seaworthy (A 1. in *Lloyd's* list), arrived at *Calcutta*, took on board a cargo for *England*, and having been overhauled and thoroughly repaired, sailed from *Calcutta* on her homeward voyage. In proceeding down the river *Hooghly* she sustained damage, by coming in contact with a brig at anchor; but having been refitted, she proceeded on her voyage, where, being already a little leaky, in consequence (as the captain thought) of the accident with the brig, she soon encountered two storms, which injured her to such a degree as to render it necessary for the captain to put back; and on the 30th of *August*, 1820, she returned to *Calcutta* in a shattered state. On the day of her arrival, the captain entered a protest, and wrote the following letter to the resident agents for the committee at *Lloyd's*: " Un-

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derstanding you have been appointed agents for *Lloyd's*, where the ship *Vittoria* is insured, I beg leave to announce to you her return to this port in consequence of stress of weather, by which she has been rendered very leaky, and almost all her rigging and sails have been carried away. It appears to me that her damage is considerable, and it is, therefore, my intention to abandon. I have entered a protest, and shall send you a copy thereof as soon as executed; in the mean time it is my intention to put her into Messrs. *Richardson* and Co.'s dock, for the purpose of holding a survey on her, at which you will, I presume, send some person to attend. I shall keep you advised of proceedings." This letter the agents answered by writing to the captain, that they approved his intention to put the *Vittoria* into dock, for the purpose of a minute survey being instituted into her present condition, and that they would, if required, direct the surveyor to attend in his official capacity. Different surveys were had, which detailed the injuries sustained by the ship, at all of which but one the surveyor appointed by *Lloyd's* agents attended. By these surveys it clearly appeared that the ship was greatly shattered, and that it would cost at least 16,000 rupees to repair her. On the 1st *September*, 1820, the day of the last survey, the captain wrote to *Lloyd's* agents, informing them of that survey; that the total expence of repairing ship and rigging would amount to 34,000 rupees; that it would be highly imprudent to attempt any repair; that he thought it for the benefit of those concerned that the ship should be sold by public auction, and repeating his wish to abandon. The agents replied by letter, that their instructions from the committee at *Lloyd's* were decidedly against any interference on their parts; that in no case was the agent to accept an abandonment of either ship or goods as the representative of the underwriters; but to leave the parties who abandoned to act on their own responsibility. The

captain

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captain then wrote to the agents, asking them if they would, as such agents, give orders for the ship being repaired. The agents having written to say, that they had no authority to give such direction, the captain sought advice on the subject by writing a full statement of the case to three of the most respectable houses in *Calcutta*, who severally declined to advise him thereon. On the 23d of *September* he applied to five several houses in *Calcutta* to advance money upon hypothecation of the ship. Four of the houses declined to make any advance, and the fifth also declined, unless the captain would hand over the freight bills and policies of insurance.

The ship was then advertised and sold by auction early in *October* for 11,000 rupees. The captain said at the trial, that he had no money to go on with the repairs; that if the ship had been his own he should have pursued the same course; and that to have repaired her, in the shattered state in which she then was, would have been an act of madness. The captain arrived in *London*, where the Plaintiff resided, on the 25th of *April*, 1821. The ship's papers were received by the Plaintiff on the 3d of *May*, and on the 5th, the broker, by word of mouth, abandoned the ship to the underwriters. *Dallas* C. J. was of opinion, that there was sufficient notice of the abandonment. The jury, under the direction of his Lordship, found a verdict for the Plaintiff as for a total loss, and that there was a justifiable cause for selling the ship.

The Solicitor-General, on a former day, obtained a rule *nisi* to set aside this verdict and have a new trial, on the ground that the notice of abandonment was not given in time; *Hunt* v. *Royal Exchange* (*a*), *Mellish* v. *Andrews* (*b*); That abandonment was necessary under

(*a*) 5 *M.* & *S.* 47.

(*b*) 15 *East*, 13.

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the circumstances; *Hodgson* v. *Blackiston* (a), *Martin* v. *Crokatt* (b), and *Allwood* v. *Henckell* (c); and that the captain was not justified in selling the ship, *Read* v. *Darby* (d), *Idle* v. *Royal Exchange Assurance* (e), that not being the course most beneficial to all concerned, especially to the underwriters on freight.

Lens and *Pell*, Serjts., now showed cause against the rule. Though it might, perhaps, have been more advantageous for the underwriters on freight if the ship had been repaired, at whatever expence, so as to pursue her voyage, yet that could only have been done at a ruinous loss to all others concerned; and the captain was entitled to exercise a discretion on the subject. *Idle* v. *Royal Exchange Assurance*, *Hayman* v. *Molton*. (f) Here, however, it was out of his power to exercise any discretion, as he failed in his attempt to obtain money to pay for the repairs. The abandonment made to the agent of *Lloyd's* in *India*, ought to be deemed sufficient; for, though he had no authority to accept the abandonment, it was his duty to communicate it to his principals; and there was no way in which the Plaintiff could expect to convey the notice to them more speedily than through the hands of their own agent. But the abandonment in *England*, being made within two days after the ship's papers arrived, (the only documents which could give the Plaintiff accurate information as to the extent of his loss), was made within a reasonable time, which is all the cases require. In *Hunt* v. *Royal Exchange* (g), the delay was five days. In *Mellish* v. *Andrews* (h), from the 8th to the 17th of the

(a) *Park's Insurance*, 231. note.
(b) 14 *East*, 465.
(c) *Park's Insurance*, 280. 7th ed.
(d) 10 *East*, 143.
(e) 3 *B. Moore*, 115. *S. C.* 8 *Taunt.*
(f) 1 *Esp. N. P. C.* 65.
(g) 5 *M. & S.* 47.
(h) 15 *East*, 13.

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the month. So, in *Gernon* v. *Royal Exchange* (a), there was manifest delay. No case decides that the notice must be given on the very day the party receives the communication of his loss. But it may be doubtful whether, where a ship is sold, it be necessary to give notice of abandonment at all. In *Hodgson* v. *Blackiston* it was holden necessary: but the contrary was ruled in *Mullett* v. *Shedden*. (b) [*Richardson* J. There the cargo was sold adversely; in *Hodgson* v. *Blackiston*, it was sold for the party concerned. *Dallas* C. J. In *Allwood* v. *Henckell*, Lord *Kenyon* inclined to think the abandonment necessary; and it may be taken for granted here.]

Taddy, in support of the rule. A captain can only be permitted to sell in cases of extreme necessity, such as a moral or physical impossibility of repairing, and no such necessity existed here; the ship was staunch when she sailed, and money might have been raised by hypothecation of the cargo. (c) It was long doubted whether a captain could lawfully sell under any circumstances. *Reid* v. *Darby*. In *Idle* v. *Royal Exchange*, this Court held there was such an extreme necessity; but the Court of King's Bench, doubting whether that had been made out, ordered a *venire de novo*. (d) At all events, a captain cannot be justified in selling the ship, except in a case in which he would have sold her if she had been uninsured. *Green* v. *Royal Exchange As-*

(a) 2 *Marsh*. 88.

(b) 13 *East*, 304.

(c) Case of the *Gratitudine*, 3 *Rob. Adm. Rep.* 240. See *Park's Insurance*, 618., note, 7th ed.

(d) *Bosanquet* Serjt., *amicus curiæ*, informed the Court that when the case of *Idle* v. *The Royal Exchange*, in error, came on for argument in K. B., that Court called on *Tindal*, who was for the Defendants in error, to point out how it appeared by the special verdict that the sale was necessary; and, after hearing some observations from him to show that the necessity was to be inferred from the finding of the jury, expressed a clear opinion

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surance. (a) In the present case, the captain would never have sold her if she had been uninsured: for if she had been repaired at an expence of 5000l., and had pursued her voyage, 7000l. would have remained out of the estimated value of 12,000l.: whereas, under the sale, only 1200l. remained: then the abandonment was not made in time. What passed between the captain and the agents for *Lloyd's* in *India*, must be put out of the question; the agents having no authority to act in the business: the captain having arrived in *London* (the place of the Plaintiff's residence) on the 25th of *April*, it cannot be believed that he delayed waiting on his owner, after such a disaster, till the 3d of *May*; if he did not so delay, the abandonment was too late according to *Mellish* v. *Andrews*, and *Hunt* v. *Royal Exchange*. As to the ship's papers not having come to hand before that day, they were not necessary to enable the owner to give notice of abandonment, as they would not inform him of the extent of his loss, a loss which it must be presumed he had heard of by letter from his captain in the long interval between *September* and *April*.

DALLAS C. J. The jury have found, in this case, that the captain had a justifiable cause for selling the ship, and they found this on all the facts in evidence in the cause: to those it becomes, therefore, necessary, in the outset, to refer; and the more so, because an endeavour has been made, though I do not say improperly, to impeach the conduct of the master, as if he had acted for his own benefit, or for the benefit of his owners, instead of acting for the benefit of all concerned. The ship having been seriously damaged in a storm, what was

that the necessity did not appear, and awarded a *venire de novo*, for the purpose of trying whether it existed or not. *Bayley* J. said that the question, whether the circumstances amounted to an abandonment, might also be left open.

The case having been settled, never came to trial on the *venire de novo*.

(a) 6 *Taunt.* 72.

was the conduct of the captain on his return to *Calcutta?* It is admitted that the underwriters have agents at *Calcutta*; not indeed for the purpose of accepting abandonments, but for the purpose of transmitting information: however, they have agents there, and what could the captain do more, as a man of justice, honour, and integrity, than give notice of abandonment to those agents? He could not abandon to the underwriters, for they were not on the spot. If their agents were not authorized to accept abandonments, they might at least have transmitted intelligence of them; and there was no other person to whom abandonment could be made. What is the next step? The captain submits the ship to a regular survey by competent persons, and, not content with his former notice to the agents, gives notice also of the survey, and invites the agents to send some one to attend. They return for answer that they will, if required, send their surveyor to attend in his official capacity. Accordingly, one of the surveyors who signed the report, which was in evidence in the cause, and proved the shattered state of the ship, was the surveyor appointed by *Lloyd's* agents. At one time the captain was inclined to repair the ship, if it had been possible: and that is clear from the attempt which he made to borrow money for the purpos[illegible] attempt which failed. The captain swears tha[illegible] ot money to go on with the repairs, and that, ir[illegible] te in which the ship was, it would have been [illegible] to attempt to repair her. Under these circumstances, the captain sells the ship, after a public advertisement; the agents of *Lloyd's* being on the spot, no protest being made against the validity of the sale, nor any thing communicated by them, to impeach its validity: and the jury come to the conclusion that the captain was perfectly warranted in all he did. The direction of Lord *Mansfield* to the jury, at the trial of the cause of *Milles* v. *Fletcher* (*a*), was, "that if they

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(*a*) *Dougl.* 219.

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were satisfied the captain had done what was best for the benefit of all concerned, they must find as for a total loss." Afterwards, upon the motion for a new trial, Lord *Mansfield* said, "The captain — had no express order; but he had an implied authority, from both sides, to do what was fit and right to be done; — and whatever it was right for him to have done, if it had been his own ship and cargo, the underwriter must answer for the consequences of, because this is within his contract of indemnity." Finally he says, "I left it to the jury to determine, whether what the captain had done was for the benefit of the concerned. If they had found 'that it was,' where would have been the question of law?" So was it left to the jury in this case; and they have found that what was done, was done in the exercise of an honest discretion, and for the benefit of all concerned; and I see no reason, (the jury having been special, and peculiarly competent to judge of such subjects,) to overturn the conclusion to which they have come.

The only remaining question is, whether notice of abandonment was given in due time; and it is to be considered, whether, under these circumstances, the rule as to notice is to be rigidly pressed. Notice must be given in reasonable time; the Court being the judge of what is reasonable; and cases have been urged, in which they have decided what is and what is not reasonable. But what is the reasonable time within which notice should be given, must, in every case, depend on the circumstances of that individual case. Here there is no evidence of any communication to the owner, of the circumstances of the loss, previously to the arrival of the captain; and the notice having been given on the day but one after the owner was furnished with the full means of knowing all the facts of the case, must be deemed sufficie

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PARK J. The verdict was clearly right on the first point; for a case of stronger necessity to justify the sale of a ship has seldom been made out. The captain could not procure money for repairs, and it was not to be expected that he should let the ship rot. Did he then act as a fair man ought? he went to the very person whom he thought authorized to act in the business, (that person, indeed, denied any authority to accept an abandonment;) but he was called in to the survey, and the ship was sold, as the most adviseable way of disposing of her when the result of that survey was known.

Then comes the question, whether the notice of abandonment was given in time: the cases say it should be given speedily, or as soon as may be, that is, within a reasonable time; and the party is not allowed to wait and see which course may turn out most to his benefit. The jury, under the direction of his Lordship, have in effect found, that more than a reasonable time was not taken in the present instance, and I think they have found correctly. We are not to assume, without proof, that the captain, on his arrival in *London*, ran with all speed to his owner, and this being a case in which no wrong has been done, ought not to be defeated on light and ill sustained objections. I am therefore of opinion that the verdict ought not to be disturbed.

BURROUGH J. Where the evidence is all on one side, and the transaction has been perfectly fair, I think the Court has no right to disturb the verdict of the jury. Who can doubt that the jury were correct in this instance, and that the captain was warranted in all he did? As to the notice of abandonment given at *Calcutta*, I have no conception that a person who is avowedly agent of *Lloyd's*, can say he has no authority to accept an abandonment; but if he can, he is bound, at all events, to write home and inform his employers of what has passed. Then we have no evidence that the owner

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knew of his loss before the 3d of *May*; and no case has gone so far as to say, that not a single day must elapse between knowledge of the loss and notice of abandonment. However, all the cases depend on their own circumstances, and no one of them can lay down a rule for another in this matter. I therefore can see no ground for disturbing the verdict.

RICHARDSON J. I am sorry to say that I see this case in a different point of view; and I could wish the case to be re-considered on both points. First, as to the necessity of sale: it is certain the assured has no right to sell, except in a case of strong necessity; perhaps he is not confined to a case of physical necessity; but the necessity must be such as would induce a prudent man, even if uninsured, to sell. What then was the necessity here? The captain contents himself with 1200*l*., where he had 12,000*l*. at stake; so that if he had been uninsured the loss must have been 10,800*l*., with the exception of the amount for which the ship's stores might have sold; whereas the loss would have amounted to no more than 5000*l*., if the ship had been repaired at that expence, and had completed her voyage. There was, it is true, some difficulty as to raising money, *Calcutta* being an expensive, though a good place for repairs; and the captain attempted, without success, to borrow on hypothecation of ship, but he never offered to hypothecate the cargo, as he might have done. It appears a strong thing to say, that he would have sold the ship for 1200*l*. if he had been uninsured. My Lord Chief Justice and my learned Brothers seem to think that the jury have concluded this point. That the captain acted honourably there can be no doubt: but I should wish it to be again considered, whether he acted for the benefit of all concerned. As to the other point, was the abandonment made in time, according to the facts which are stated to have occurred in *London*? The

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captain arrived in *London* (where the owner lived) on the 25th of *April*. It does not appear that he had any communication with his owner, and that is one of the things I should wish to have submitted to another enquiry; for on his arriving from *India*, after such a loss, one would have thought he would have seen his owner immediately. It is, indeed, difficult, in a case where substantial justice has been done, to divest oneself of the feeling which is excited, and to decide a point like this, which seems to conflict with the justice of the case; — but I do not think it necessary that the owner should wait for the ship's papers to make abandonment, if the captain communicated with him on arriving in *London*; and it would be satisfactory to me to know, whether that was so or not.

Rule discharged.

Nov. 17.

FORSHAW v. CHABERT.

Policy of insurance on ship and goods, at and from *Cuba* to *Liverpool*, with liberty, "in that voyage, to proceed and sail to, and touch and stay at, any ports or places whatsoever, and with leave to discharge and take in, at any ports or places she might touch at, without prejudice to that insurance." The insured, after subscription of the policy, inserted in the body of it the words, "with leave to call off *Jamaica*," to which interpolation all the underwriters assented, without increase of *premium*, except the Defendant, who, being out of the way, was not applied to. The captain sailed from *Cuba* with eight men, engaged to navigate to *Liverpool*, and two to *Jamaica*, being unable at *Cuba* to procure ten men (the proper complement of the crew) for *Liverpool*. He then touched at *Jamaica*, for the sole purpose of landing the two men, and procuring others in their stead; and having accomplished his purpose, was lost on the voyage from *Jamaica* to *Liverpool*: Held,

1st. That this was a material alteration of the policy, and rendered it void.

2d. That the ship was not, as to her crew, seaworthy for the whole voyage (as she ought to have been) when she sailed from *Cuba*.

3d. That the circumstance of her having become seaworthy after her leaving *Cuba*, and before the loss, did not entitle the Plaintiff to recover.

ASSUMPSIT on a policy of insurance on the ship *Hope* and goods, "at and from her port or ports of lading in *Cuba*, to *Liverpool*," with liberty, "in that voyage, to proceed and sail to, and touch and stay at, any ports or places whatsoever; and with leave to discharge and take in at any ports or places she might touch at, without prejudice to that insurance." At the trial, before *Dallas* C. J., at the *London* sittings after last *Trinity* term, it appeared, that, subsequently to the subscription of the policy by the different underwriters, the words "with leave to call off *Jamaica*," had been inserted in the body of it, after the word "*Liverpool*." All the underwriters, except the Defendant, on being applied to, sanctioned this interpolation, by writing their initials in the margin of the policy, opposite to the words inserted, and required no additional premium. The Defendant being ill and absent from *London*, was not applied to for this purpose. There were two counts in the declaration, on the policy in question, the first, setting out the policy, with the words interpolated, the other, setting it out as it originally stood.

The captain having lost some of his outward bound crew by sickness and desertion, at *Cuba*, and finding it

impossible,

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impossible, there, to engage ten men for *Liverpool*, sailed from *Cuba*, with a crew, composed of eight men engaged for *Liverpool*, and two for *Montego Bay*, in *Jamaica*. He then proceeded to and touched at *Montego Bay*, for the sole purpose of landing the two men, (who refused to proceed further,) and of procuring others to supply their place. Having effected both these objects, he sailed from *Montego Bay*; and the ship, while in the prosecution of her homeward voyage, was lost. It was proved that ten men were a sufficient crew to navigate such a vessel as the *Hope* to *England*, and that the captain had no fraudulent purpose in touching at *Montego Bay*. Some of the witnesses said the touching at *Jamaica* increased the risk, and others denied this. It was objected, on the part of the Defendant, that the alteration in the policy was material, and rendered it void; that the touching at *Montego Bay* was a deviation; and that the ship having sailed from *Cuba* with an insufficient crew, was not seaworthy when she broke ground; (eight men only being there engaged for *England*.) But the jury found a verdict for the Plaintiff, and that the captain put into *Montego Bay* for a justifiable cause, even though there had been no alteration in the policy.

Taddy Serjt., on a former day, having obtained a rule *nisi* to set aside this verdict, and instead thereof, to enter a general verdict for the Defendant, or to have a new trial, on the grounds of objection above stated.

Hullock Serjt. now shewed cause against the rule. The ship was seaworthy when she left *Cuba*; ten men being a sufficient crew. The inconvenience would be monstrous if a captain, who cannot obtain a full crew for the whole of his voyage, were precluded from engaging men to forward him a part of the way to a place where he may find others who will proceed with him. It was, therefore, not unseaworthiness, but a supervening necessity that compelled the captain to put into *Montego*

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Bay; so that, under the circumstances, this being no deviation, the alteration in the policy becomes immaterial, and the alteration being in an immaterial point, the policy is not avoided. *Sanderson* v. *Symonds*. (*a*) In all the cases wherein an alteration has been holden to avoid the policy, the alteration has been in a material point. *Langhorn* v. *Cologan*. (*b*) *Fairlie* v. *Christie*. (*c*) That the touching at *Jamaica* did not increase the risk, appears, from the other underwriters having sanctioned the alteration, without requiring any additional premium. As to seaworthiness, even if it should be taken that the ship had not a sufficient crew at *Cuba*, yet, as the loss did not happen till after she had actually obtained a sufficient crew, the underwriters are liable. *Weir* v. *Aberdeen*. (*d*)

Taddy, in support of his rule. Though the ship, when she sailed from *Cuba*, was seaworthy to proceed to *Montego Bay*, she was not seaworthy to proceed to *Liverpool*, as she ought to have been, to entitle the Plaintiff to recover under this policy. *Eden* v. *Parkison*. (*e*) *Forbes* v. *Wilson*. (*f*) Then the touching at *Montego Bay*, not being occasioned by supervening necessity, but by the captain's omission to procure a proper crew for *Liverpool*, was a deviation which would discharge the underwriter, unless he had sanctioned the alteration in the policy. If the captain were justified in breaking ground with a crew incomplete for the whole voyage, because he expected to complete his crew at *Montego Bay*, he would be equally justified in performing the whole voyage by successive engagements from island to island. Whether it turns out eventually pos-

(*a*) *Ante*, I. 426.
(*b*) 4 *Taunt*. 330.
(*c*) 7 *Taunt*. 416.
(*d*) 2 *B.* & *A*. 320.
(*e*) *Dougl*. 732. *Park's Insurance*, 333.
(*f*) *Park's Insurance*, 344. n.

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sible to do so or not, the captain is bound to sail with a sufficient crew; for the ship must be seaworthy at the time of sailing. *Munro* v. *Vandam.* (a) *Watson* v. *Clark.* (b) If there be a probability that the assured will not be able to fulfil that condition, which is tacitly annexed to all insurances on ships, he ought to stipulate accordingly. If, therefore, this would have been a deviation, but for the alteration of the policy; the alteration is material, affects the integrity of the instrument, and avoids the policy, as to the Defendant. It is true, the ship was not lost till after she had left *Jamaica*; but whether the alteration in a policy is material, does not depend on the event of the voyage, but on the question, whether the risk is increased at the time the alteration is made. With respect to the ship's having been rendered seaworthy before the loss happened, (she having sailed at first, clearly not seaworthy, for *Liverpool*), the case of *Weir* v. *Aberdeen* has gone further than any case that preceded it; but that case is distinguishable from the present, for it may be impossible to prove, with certainty, what amount of cargo a ship will safely carry; so, that if a ship is overladen, and the putting back to discharge part of the cargo be held to avoid the policy, captains may be induced to incur the chance of loss, to the disadvantage of the insurers; whereas, the fact of a ship having a sufficient or insufficient crew, is certainly known, and easily proved. *Sanderson* v. *Symonds* does not press the Defendant on the point of alteration, for in that case there were words in the policy equivalent to a permission to trade; while *Fairlie* v. *Christie* and *Langhorn* v. *Cologan* (cases which have never been impeached) are in point for the Defendant.

DALLAS C. J. This is an objection to which one feels disposed very reluctantly to yield, for it is an objection

(a) *Park's Insurance*, 333. n. (b) 1 *Dow.* 336.

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against the justice of the case. All the other underwriters were applied to for their consent to the alteration of the policy, and gave that consent; thereby saying for themselves (of all persons the best qualified to form a judgment on the subject) that this alteration occasioned no increase of risk; but, unfortunately for the assured, no such application was made, as far as this individual underwriter was concerned; and though, undoubtedly, he would have been applied to if he had been in the way, and probably would have added his initials to the others, yet, as he has not done so, he contends he is not bound. However, we must decide on legal grounds, and the question then will be, whether the ship was or was not seaworthy at the time of sailing? Here, it must be observed, that the voyage insured was not a voyage from *London* to *Cuba* and back again from *Cuba* to *London*, in other words, a voyage out and home, but a voyage from *Cuba* to *Liverpool*, and that the words added to the policy were, "with leave to call off *Jamaica*," thereby shewing, that, in the opinion of the party who added them, liberty to touch at *Jamaica*, was not within the terms of the original contract. Now it is clear that a ship must be seaworthy at the time when she sails; the assured warrants that, and whatever physical necessities may interpose, he is not allowed to deviate from the strict terms of his warranty. It is clear, too, that what was done by the captain in the present case, was done without fraud, and for the best; he went from *Cuba* to *Montego Bay* for the sole purpose of procuring more men: was he justified in doing this or not? If he had a sufficient crew for the voyage at *Cuba*, then this was an increase of risk; he had no right to go circuitously; and the touching at *Montego Bay* would thus be a deviation without necessity. Take it the other way, that he had ten men, a sufficient crew for the voyage, but only eight of them engaged for *Liverpool* and two for *Montego Bay*, and that he went

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to *Montego Bay* to procure two others to supply the places of those who were to leave him; then the ship was not seaworthy when she sailed from *Cuba*, because the captain ought then to have had ten men for *Liverpool*, and not eight for *Liverpool* and two for *Montego Bay*. Either the ship was not seaworthy at the time of sailing, or there has been a deviation. The jury found, that the captain put in to *Montego Bay* for a justifiable cause; even though there had been no alteration in the policy; but I go on the circumstance that the ship had not a sufficient crew at the time she sailed, and that the insurance had no inception, because the ship was not seaworthy at the time of sailing. The only way in which the Defendant could be liable, he having subscribed a policy without the words "with leave to call off *Jamaica*," (a policy by which the assured was bound to go direct from *Cuba* to *Liverpool*), would have been by a loss happening in that direct course; so that a question would arise, whether the Defendant could be liable in this case on his original contract, even though nothing had been done which could affect that contract; but here there is an alteration in the body of the policy, and, according to some of the witnesses, in a material point of the risk. The words introduced, therefore, must be taken to increase the risk; and are introduced into the body of the policy, making it in effect a different instrument from what it was when subscribed by the Defendant. I need not go into the general doctrine touching the alteration of deeds; it is clear that an alteration in a material part will render an instrument void. In the present case, the alteration, when made, was material, and only became immaterial with reference to subsequent events; the fact being, that the ship was not lost in consequence of touching at *Montego Bay*. But it is material to consider the effect of the alteration at the time when it was made; if it increased the risk then, it was material, and not warranted by any authority. The only case which I shall advert to, is that of

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Sanderson v. *Symonds*; in that case, the alteration was no alteration of the contract, for the original words of the policy were "at and from *Liverpool* to her port or ports, place or places of discharge, and loading in *Africa* and *African* islands, and *during her stay* there, at and from thence back to *Liverpool*, or her final port or place of discharge, in the united kingdom," with liberty, on that voyage, "to proceed and sail to, and touch and stay at any ports or places whatsoever and wheresoever as above, to *sell*, *barter*, and *exchange goods*; and load, unload, and reload goods at any or all of the ports and places she may call at and proceed to." The broker having inserted the words "and trade," after the words "during her stay," the Court held, that there was no material alteration, because the instrument, as originally drawn, gave the Plaintiff leave to trade. In the present case, the alteration was material at the time it was made, and what arose afterwards cannot have a retrospective effect. First, then, the ship was not seaworthy at the time of sailing; and, secondly, there has been a material alteration of the policy; and on these grounds the Defendant is entitled to have his rule made absolute.

PARK J. It is with extreme reluctance that I agree in both points in the decision which has been pronounced, because the resistance in this case appears to be most unjust; but whatever feelings may arise on the occasion, we must keep our minds free from prejudice, and decide according to law. I shall begin with the objection touching the alteration of the policy; and, as to that, we have been pressed with the cases already decided on the subject; but the present decision will not trench on the principles laid down by them. The circumstances of *Langhorn* v. *Cologan* were indeed different from those of the present case, for there the policy was in blank, and the alteration

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was in a material point: In *Fairlie* v. *Christie*, we were of opinion that the policy was void, and who could doubt it? a warranty to sail on a particular day was altered from *October* to *December*; so that the underwriter had a winter risk put upon him without his consent. But *Sanderson* v. *Symonds* was a very different case, because there, the insured, who had leave to barter, inserted the words "*and trade*;" but if he had leave to barter, what difference was there in saying he had leave to trade? Here an alteration has been made on the face of the policy in a material point, and the integrity of the instrument is destroyed; the point, indeed, is indirectly decided in *Hill* v. *Patten* (*a*), where the alteration, though assented to, so far altered the contract, as to render a new stamp necessary, and the contract being void for the want of one, Lord *Ellenborough* says (*b*), "I cannot say that the policy is not so altered as to have lost its original identity, — and I do not think the Plaintiff can recur to it again in its original state." *Le Blanc* J. says, "Can the Court enforce an agreement after the parties have, upon the very face of the instrument, declared that it is not their agreement?" Now, though both parties did not assent to the alteration in this case, yet there is a material alteration by one, which "is inserted in the body of the original agreement, and makes it speak a different language." (*c*) The assured was at liberty to call at any ports or places for a specific purpose, namely, to *discharge*, but not at liberty to touch generally at *Montego Bay*, which might have been for any purpose inconsistent with the contract of the underwriter. This, therefore, is clearly a material alteration. As to the other point, I am now of opinion, though I was not so when I came into court, that this vessel must be considered to have been

(*a*) 8 *East*, 373.

(*b*) In *French* v. *Patton*, 9 *East*, 356.

(*c*) *Verba Le Blanc* J. 9 *East*, 357.

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not seaworthy. Was she at the time she sailed seaworthy for her whole voyage? She had ten men, a crew sufficient in number, but only eight of them were engaged for the whole voyage; and if the captain might start with so imperfect a crew, and might supply the deficiency, as he did afterwards, he might equally be entitled to make a voyage from port to port, instead of a voyage direct from *Cuba* to *Liverpool*.

BURROUGH J. This policy is on a voyage from *Cuba* to *Liverpool*, with liberty in that voyage "to proceed and sail to, and touch and stay at any ports or places whatsoever, and with leave to discharge and take in, at any ports or places she might touch at, without prejudice to that insurance;" words which can only apply to the voyage from *Cuba* to *Liverpool*; but if the words "with leave to call off *Jamaica*," be inserted, the ship may discharge there also; so that no one can doubt that the alteration in the policy is material. I do not regard what the finding of the jury at *nisi prius* may be, because the Judges must look at the instrument. The province of the jury is, to deal with matters of fact, but I disclaim the notion that their finding is to bind a Judge in his opinion on matters of law. I am clearly of opinion that there has been a material alteration here, and there is nothing in any decided case which stands in the way of this opinion. In *Sanderson* v. *Symonds* the assured having originally leave to barter, could not be said to extend the terms of the contract, by adding the repetition, "and trade."

As to the other point, the ship sailed, it is true, with ten men from *Cuba*, but eight of them only were engaged for *Liverpool*: can it be said, then, that she sailed with a proper crew for the whole voyage? The captain was bound to have a proper complement when he started; and, as he failed in this, I am clearly of opinion, that the ship was not seaworthy.

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RICHARDSON J. The first point to be considered, is, whether there was in this case any valid contract on which the Plaintiff could sue; and I am bound by the decisions, to be of opinion, that there has been here a material alteration which has avoided the policy as to the Defendant. It is material, too, that this alteration is in the body of the policy, and that the instrument cannot be now read without varying the intention of the party; if such alterations were permitted, a door would be opened to fraud of the most extensive description. The alteration is material in its effect, because it gives the assured leave to call at *Jamaica*, where ships do not usually call in the course of a voyage from *Cuba* to *Liverpool*. That the permission of such an alteration might lead to fraud in many instances, is clear, from the circumstance, that the underwriter's signature is often proved by one who is acquainted with his hand-writing, and not by the broker who managed the contract, and who, perhaps, alone knows what were its original terms; and if this instrument had been so proved, the Defendant might have been fixed with a contract different from the contract which he signed. The decision in this case is quite consistent with the decision in *Langhorn* v. *Cologan*, where the policy being printed, there were no words to say on what the policy was effected, but such words were afterwards inserted in the blank space; and the Court held, that this was a material alteration in the body of the instrument which vitiated the policy. In *Fairlie* v. *Christie* the alteration was by drawing the pen through certain words expressive of the time of warranty of sailing, which stood in the body of the policy, and inserting in a memorandum in the margin a different time for sailing. Still the Court held that the policy was avoided, because, by the alteration, the integrity of the instrument was affected. In *Sanderson* v. *Symonds* the alteration was entirely immaterial. *Hill* v. *Patten* and

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French v. *Patton* are perhaps not in point, because, in those cases, the parties assented to the alteration. I give no opinion on the point, whether, in this instance, the ship was seaworthy at the time of her sailing."

Rule absolute.

Nov. 28.

CARR *v.* SMYTHIES.

Plaintiff, an attorney, sued for 21*l.* 7*s.* 11*d.* Defendant, previously to the delivery of declaration, took out a summons to stay proceedings, on payment of 15*l.* and the costs then incurred. Plaintiff refusing to accept the 15*l.*, proceeded by delivering a declaration, but afterwards took the 15*l.* in full satisfaction of his demand, and taxed his costs. The debt having been due to the Plaintiff for five years, and the Defendant having frequently promised to pay it, the Court refused to order the costs to be re-taxed, so as to allow the Defendant the costs incurred between the summons to stay proceedings and the taking of the of Court.

THE Defendant, on the 3d of *April*, 1821, previously to the delivery of the declaration in this action, took out a summons to stay proceedings on payment of 15*l.*, and the costs then incurred. The Plaintiff, an attorney, sought to recover 21*l.* 7*s.* 11*d.*, and refusing to accept the 15*l.*, proceeded in the action by delivering a declaration; but on the 13th of *November*, he took the 15*l.* out of court in full satisfaction of his demand: costs having then been taxed for the Plaintiff, up to the time at which he took the money out of court,

Cross Serjt., on a former day obtained a rule, calling on the Plaintiff to shew cause, why so much of the common rule as related to the taxing of costs should not be discharged, and why it should not be referred back to the prothonotary to tax the Plaintiff's costs up to the 3d of *April*, and also the Defendant's costs incurred in the action since that day, and why the amount of such respective costs, when so taxed, should not be set off

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the one against the other, and the balance only be allowed as between the parties, and the Plaintiff refund such balance, if any, to the Defendant's attorney or agent, and why the Plaintiff should not pay the Defendant his costs occasioned by this application. He cited in favour of his motion, *James* v. *Raggett* (*a*), *Zarvin* v. *Cowell* (*b*), *Roberts* v. *Lambert* (*c*), and *Johnson* v. *Houlditch*. (*d*) (The Court referred him to *Burmester* v. *Hilch*. (*e*)

Lens Serjt., in shewing cause against the rule, read an affidavit, by which it appeared, that the Defendant's debt had been due to the Plaintiff for five years, that the Defendant had been often requested, and had often promised to pay it. He cited *Gibbon* v. *Copeman* (*f*), contending that the common practice was never disturbed, except in cases where needless vexation was clearly made out.

Cross, in support of his rule. In *Burmester* v. *Hilch*, *Johnson* v. *Holditch* was not cited, and no vexation was proved; whereas the Plaintiff in the present case being himself an attorney, and cognisant of the practice of the court, vexation must be inferred from all the circumstances of the case.

DALLAS C. J. I am of opinion, there is no ground whatever for this application in the result of the facts now before the Court. The way in which the Defendant ought to have proceeded, has been stated in one of the cases. (*g*) Lord *Ellenborough* says, "The Defendant might have tendered the sum admitted to be

(*a*) 2 *B. & A.* 776.
(*b*) 2 *Taunt.* 203.
(*c*) 2 *Taunt.* 283.
(*d*) 1 *Burr.* 578.
(*e*) 13 *East*, 551.
(*f*) 5 *Taunt.* 840. 1 *Marsh.* 392.
(*g*) *Burmester* v. *Hilch*.

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due, before action brought, and then he might have pleaded the tender and paid the money into court." *Le Blanc* J. says, "Without a strong case made out to shew an intentional vexation, and a view to enhance expence on the part of the Plaintiff, there seems to be no ground for the Court to interfere out of the ordinary course." All the cases lead to this principle; not that the Court will presume vexation, but that a strong case must be made out. Here, the debt was due five years ago, and instead of any intention to vex the Defendant, there seems rather an inclination to allow him the interest of his debt. It is a case in which, at all events, the Court cannot presume vexation; and therefore, the rule must be discharged.

PARK J. We cannot presume vexation, and I can easily conceive there has been none in the present instance. A Plaintiff does not usually attend at the Judges' chambers; and though the offer made there was refused, the Plaintiff might afterwards, on consideration, think it adviseable rather to accept what was paid, than to proceed further. This matter has been before the Court three times since I have sat in it. On the first occasion (*a*), *Gibbs* C. J. adopted the rule laid down by *Le Blanc* J., in *Burmester* v. *Hilch*, and went through all the cases. On the second (*b*), *Dallas* J. gave a judgment to the same effect; which was afterwards adhered to in *Aspinall v. Smith.* (*c*)

BURROUGH J. Every one who comes to disturb the order of practice, must shew a ground for his request: the practice is clear, and the party must make out a strong case before he can depart from it. Here there is

(*a*) In *Last* v. *Benton*, 2 *Marsh.* 478.

(*b*) In *Jones* v. *Johnson*, *C.P.*, *Easter*, 57 *Geo.* 3.

(*c*) *C. P.*, *Michaelmas*, 59 *Geo.* 3.

is not the least ground for charging the Plaintiff with oppression; the Defendant ought to have tendered the money before action brought.

RICHARDSON J. concurring, the rule was

Discharged.

JAMES LESLIE v. RICHARD WILSON, THOMAS REDHOUSE, and JOSEPH JENKING.

Nov. 28.

Goods conveyed by ship having been spoiled, in consequence of the negligence and unskilfulness of the captain, the freighter sued the owners (one of whom was the captain) for damages, in an action on the case: Held, that the action lay, [illegible] captain had entered into a charter-party, under seal, with the freighter and another, by which he engaged to convey the goods to their destination; it not appearing on the charterparty that the captain was part owner, nor that the freighter knew him to be such when the charter-party was executed.

THIS was an action on the case, in which the Plaintiff declared, that at the request of the Defendants, he shipped and put on board a vessel of theirs, certain boxes of oranges, to be safely and securely carried and conveyed by them in such vessel, from *St. Michaels* to *London*; and that it, therefore, became the duty of the Defendants, as owners of such vessel, safely and securely to carry and convey the said goods; and, for that purpose, to prepare and provide all things necessary in that behalf, and (amongst other things) to procure a proper and skilful master or captain, for the purpose of conveying the goods with safety and security. Yet, that the Defendants not regarding their duty as owners, did not, nor would safely and securely carry and convey the goods, nor, as owners, procure a proper or skilful master or captain, but therein wholly made default; and, on the contrary, employed an unskilful and improper master or captain, by and through whose misconduct, carelessness and negligence, the arrival of the vessel at her port of destination was delayed, and the goods so laden on board the vessel were damaged, rotten and destroyed.

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The second count was more general. The Defendants pleaded that they were not guilty.

The cause was tried at *Guildhall*, before *Dallas* C. J., after *Michaelmas* term, 1820, when the jury found a verdict for the Plaintiff, damages 110*l.*; but his Lordship reserved the point for the opinion of this Court, as to whether the action was maintainable or not; and a rule having been accordingly obtained last *Hilary* term, to shew cause why this verdict should not be set aside and a nonsuit entered, the Court after argument, by *Lens* Serjt. for the Plaintiff, and *Vaughan* and *Taddy* Serjts. for the Defendants, directed the facts to be turned into a case, in which the question was stated to be, whether the action were maintainable.

The case then stated, that the Plaintiff was an orange merchant at *St. Michaels*. That the Defendants were owners of the ship *Eliza* and *Jane*; that the Plaintiffs shipped the oranges under a bill of lading, stating the Defendant, *Jenking*, to be master for that voyage. This bill of lading was signed by the Defendant, *Jenking*.

The case then stated a charter-party of affreightment between the said *Joseph Jenking*, commander of the vessel, of the one part, and *John Adam*, and *James Leslie*, (the Plaintiff,) freighters of the said vessel, of the other part, by which the commander agreed with the freighters, that the schooner being tight, staunch, and every way properly fitted, victualled and manned, as is usual for vessels in merchants' service, he, the commander, or some other proper person in his stead, should immediately receive on board from the freighters or their agents, the goods in question, and being dispatched therewith, on or before the 5th *October* then next, should with all possible speed set sail to *St. Michaels*, make a true delivery of the goods, and there receive on board such quantity of fruit as the agents or assigns of the freighters should think fit to load, &c. &c.

It

It is not necessary to state more of the instrument which was under the hands and seals of *Jenking*, *Adam*, and *Leslie*. The case stated the arrival of the ship at *St. Michaels*, that the cargo of oranges was put on board, and the ship ready for sea; that the Plaintiff, *Leslie*, requested *Jenking* to provision the ship, that he neglected to do it; and the facts stated in the case, shewed the grossest neglect of duty in him, the master, by means of which the voyage was so delayed, that the vessel which might have arrived in the month of *March*, did not arrive till the 5th of *May*; by reason of which the cargo of oranges was much damaged.

The case was argued again in this term, by *Lens* Serjt. for the Plaintiff, and *Taddy* Serjt. for the Defendants.

Arguments for the Plaintiff. This action will lie against the Defendants as ship-owners, notwithstanding they have entered into a charter-party, jointly with their captain, *Jenking*. No covenant in that charter-party is precisely applicable to the misconduct of which the plaintiff complains; so that he need not dispute the principle, that assumpsit or case will not lie where there is a remedy of a higher description. But even if there were a covenant in the charter-party applicable to the Plaintiff's case, that would not be a bar to his suing in this action on the custom of the realm. The distinction being, that where the cause of action arises out of the contract alone, a lower species of remedy cannot be resorted to, when the Plaintiff is entitled to a higher; but where the law gives the party a right, independently of his contract, he may elect which remedy he pleases. Thus a party may have an action on the case in the nature of waste, against one who is under covenant not to commit waste, *Kinlyside* v. *Thornton*.(a) However, in the present instance, the

(a) 2 *Bl. Rep.* 1111.

action

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action and the cause of complaint is not against the same parties as were concerned in the charter-party; and that circumstance distinguishes the present case from *Schack* v. *Anthony* (a), where the master acting as agent of the owners had power to bind them, and render them liable, which power *Jenking* had not, with respect to the Defendants.

Arguments for the Defendants. This action would not lie against *Jenking* alone, and if it would not lie against him alone, neither will it lie against him jointly with the others; for the two leading provisions in the charter-party are applicable to the Plaintiff's cause of complaint; and as covenant would have been the proper action on that instrument, an action of a lower degree will not lie. The bill of lading and charter-party are so connected together, that the Plaintiff was bound to sue *Jenking*, if he sued at all, and *Schack* v. *Anthony* is in point to shew, that this action will not lie against him, even though it be framed in tort; for where the tort arises out of a contract, the incidents of an action in tort are the same as those of an action on the contract. *Max* v. *Roberts*. (b) *Weall* v. *King* (c). In *Kinlyside* v. *Thornton* there was a tort independent of the contract; and *Jones* v. *Hill* (d) is an authority to shew, that waste will only lie for that which would be waste if there were no stipulation respecting it. To the same effect is *Dyer*, 198. *b.* *pl.* 53., *Co. Litt.* 54. *b.* And at common law waste only lay against such as did not come in by contract, (as tenant in dower, &c.); it is only by statute it has been extended to tenant for life or years. Here there is no wrong independently of the contract.

(a) 1 *M. & S.* 573.
(b) 12 *East*, 89.
(c) 12 *East*, 452.
(d) 7 *Taunt.* 392.

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DALLAS C. J. now delivered judgment; and, after stating the pleadings and case, as above set forth, proceeded as follows: On these facts we are of opinion that the action was properly brought.

The owners of a ship, for whose benefit she is navigated, are bound by the maritime law to owners of goods, shipped and received on board to be carried, for the due carriage thereof, and are liable for any negligence on the part of themselves or their servants whereby the goods may be damaged.

If, without fraud, and in the due course of the ship's employment, the master makes a charter-party, the ship-owners are not thereby divested of liability, but are still liable for the performance of such duties, belonging to them in that character, as are not inconsistent with the stipulations of the charter-party.

And, whether the charter-party be made under the seal of the master, or not, seems to make no difference in this respect; because the ship-owners are not charged directly upon the contract of charter-party, but upon their general liability as principals in the adventure, deriving profit from the ship's employment, for the performance of such duties as belong to them in that character, and are not inconsistent with the charter-party.

A special action on the case, like the present, seems to us to be a proper form of action, for recovery of damages for the breach of such duties.

In this case, a further difficulty has been much pressed upon us, arising from the circumstance that the master here happens to unite in himself the character also of a part-owner. In the charter-party, however, he is not described as part-owner, but as commander only; nor does it appear, that it was at all known to the Plaintiff, or to any other person concerned in the cargo, that he possessed any other character or interest than that of commander or master.

It

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It seems to us, therefore, that this circumstance, thus unknown, cannot be set up, either by him or by the other part-owners, to bar the Plaintiff of a right of action, to which he would, otherwise, have been entitled.

In this view of the present case, none of the questions are involved, in which so much difference of opinion has arisen in *Govett* v. *Radnidge* (a), *Powell* v. *Layton* (b), *Max* v. *Roberts*, *Weall* v. *King*, and other cases. For, if this action is maintainable, as we think it is, against the Defendant *Jenking*, as well as against the other two Defendants, it is unnecessary to consider whether it could have been maintained against the other two Defendants alone, if it it had not been maintainable against *Jenking*.

Judgment for the Plaintiff.

(a) 3 *East*, 62.

(b) 2 *N. R.* 365.

END OF MICHAELMAS TERM.

CASES

ARGUED AND DETERMINED 1822.

IN THE

Court of COMMON PLEAS,

AND

OTHER COURTS,

IN

Hilary Term,

In the Second and Third Years of the Reign of George IV.

Duff and Others *v.* Budd. *Jan.* 24.

CASE against a carrier for negligence. At the trial before *Dallas* C. J., *London* sittings after *Michaelmas* term, the facts were as follow.

A per-

Plaintiffs having received an order from a stranger to furnish *J. Parker* of *High-street, Oxford*, with goods, and finding upon enquiry that Mr. *Parker* of the *High-street* was a tradesman of respectability, forwarded the goods by a carrier, having directed them to *J. Parker, High-street, Oxford.* On the arrival of the parcel at *Oxford*, the carrier's porter there, who knew *W. Parker* of the *High-street*, (and who was accustomed to deliver parcels at the houses of the consignees,) told him of the arrival of the parcel, no other *Parker* residing in that street. *W. P.* said he expected no parcel. A person to whom the porter had before delivered parcels under the name of *Parker*, called at the Defendant's office shortly afterwards, and saying the parcel was his, was allowed to take it on paying the carriage, there being many persons of that name at *Oxford*. The Plaintiffs having thus lost their goods, desired the Defendant, by letter, to apprehend the person who had taken them, if he again presented himself, and afterwards said, that they had done with the Defendant, if the man who had the parcel were produced. A notice was suspended in a conspicuous part of the Defendant's office, limiting his responsibility to 5*l.*, except where articles were entered according to their value; and the parcel in question had not been so entered, though worth 89*l.*; but the Plaintiffs' porter swore he never saw the notice. The Plaintiffs having sued the carrier, and the Judge having directed the jury that the carrier's negligence had been such as to render it unnecessary to consider

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consider the question as to the notice touching the limited responsibility, and a verdict having been found for the Plaintiffs, The Court refused to grant a new trial, which was moved for on the ground that the question touching the notice ought to have been considered; that the Judge ought to have pointed the attention of the jury to the Plaintiffs' letter, directing the carrier to apprehend the cheat, and the subsequent conversations thereon; and that the property of the goods had passed out of the Plaintiffs.

A person unknown to the Plaintiffs requested them to send some silks and other goods to Mr. *James Parker*, of *High-street*, *Oxford*; the Plaintiffs never having dealt with *Parker*, made enquiries about him, and finding that Mr. *Parker*, residing in *High-street*, *Oxford*, was a tradesman of great respectability, forwarded the goods in question by the Defendant's waggon, having directed the parcel to "Mr. *James Parker*, *High-street*, *Oxford*." The Defendant's porter at *Oxford* knew *William Parker* of *High-street*, at whose house he had delivered parcels, (it being the course of Defendant's office to deliver parcels at the house of the consignee); and on the morning after the arrival of the parcel, went to this *Parker*, and informed him of the circumstance. *Parker* said he expected no parcel. Shortly afterwards, a person came to the Defendant's office; where, seeing the parcel directed as before mentioned, he claimed it as his own, and on his paying the carriage, the parcel was delivered to him. The porter had before delivered to this person parcels directed for Mr. *Parker*, *Oxford*, to be left till called for. Many persons of the name of *Parker* reside in *Oxford*, but none of that name was at this time residing in *High-street*, except Mr. *William Parker*, the printseller, the person to whom the porter addressed himself as above stated. The Plaintiffs having soon discovered that they had been imposed upon, *Brooks*, one of them, wrote to the Defendant, desiring, that should the person who had claimed the parcel in question be found, he might be detained as a swindler; and soon afterwards, in a conversation with a servant of the Defendant at his office in *Oxford*, suggested the same course, saying, he had no doubt the parcel had been delivered to the man who ordered it. In another conversation at the same office, he said, that if they could produce to him the man who had the parcel,

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cel, he had done with the Defendant. After this, the book-keeper wrote to *Brooks*, informing him, that the person respecting whom he enquired, when in *Oxford*, had been there, and was expected again in a short time; that the Defendant could not detain him, as he had not a sufficient charge to make, but suggested, that if *Brooks* attended, he might procure a warrant to apprehend him. *Brooks* wrote in answer, that as the parcel was not delivered according to the direction on it, he had no claim on Mr. *Parker*, but should consider the Defendant responsible for the value of the parcel. It appeared that some attempts were made by the book-keeper and others connected with the office to detain the swindler, which attempts failed. The parcel was worth about 89*l.*, and the following notice was in a conspicuous part of the Defendant's office in *London*: "Take notice, that the proprietors of the public carriages, who transact their business at this office, will not be answerable for any packages containing cash, bank notes, bills, jewels, plate or watches, however small the value may be, or for any package of more than five pounds value, if lost or damaged, unless the same is specified when delivered into the office." The value of the Plaintiffs' parcel was not specified, but their porter, who could read, swore he never saw the notice. *Dallas* C. J. stated to the jury, that there were two questions for their opinion. The first arising upon the notice. The second, whether there had been gross negligence on the part of the Defendant. The learned Judge observed that, in one view of the case, it might not be necessary for the jury to consider the first question; for that, if notice was given, and there had been gross negligence on the part of the Defendant, the Defendant was liable (a); and he directed the jury

(a) See *Garnett* v. *Willan*, 5 *B.* & *A.* 53., and the cases there cited.

 to

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to consider, whether, under the circumstances, the Defendant had been guilty of gross negligence or not; explaining to them, that, if the Defendant and his servants had not taken the same care of the property as a prudent man would have taken of his own, he had been guilty of gross negligence. (a)

The jury found a verdict for the Plaintiffs.

Pell Serjt. now moved for a new trial, on the ground, first, that the question of notice ought to have been pointed out to the consideration of the jury, inasmuch as conduct which would amount to gross negligence with respect to a parcel of great value, might be reasonable care with respect to a parcel of small value, and the Defendants were not warned as they ought to have been, that the Plaintiffs' parcel was of great value. Secondly, that the learned Judge had not directed the attention of the jury to the letter and conversations, by which one of the Plaintiffs directed the Defendant to apprehend the person who had taken the goods; and from which it might be collected, that the Plaintiffs considered the Defendant not responsible for the loss. Thirdly, that the property in the goods was not in the Plaintiff but in the consignee. On the first point, *Pell* cited the words of *Bayley* J., in *Batson* v. *Donovan.* (b) "I left, I believe, these two questions to the jury; first, whether the Plaintiffs dealt fairly by the Defendants, in not apprising them that the box contained articles of value; and secondly, whether in the case of a parcel of such value as the Defendants might fairly expect this to be, there was gross negligence in the Defendants:" and urged, that the carrier had a right to suppose the worth of the parcel less than 5*l.*,

(a) See *Batson* v. *Donovan*, 4 *B.* & *A.* 30., per *Best* J.

(b) 4 *B.* & *A.* 35.

because

because it was booked and entered only as a parcel of less value.

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DALLAS C. J. I certainly did state at the trial, that this was a question of importance, and I think so now; but not in the view which my Brother *Pell* has taken of the case, or, because I feel any difficulty in coming to a decision on it: for, at the conclusion of the cause, I did not feel, nor did the special jury, one instant of hesitation. I agree that the case is of importance to the rights of carriers; but it is also important with respect to their obligations, and the rights of the public.

A person calls on the Plaintiffs, and orders goods for a respectable tradesman, Mr. *Parker*, of the *High-street, Oxford.* The Plaintiffs having had no previous dealings with this tradesman, or the party ordering the goods, pause; but, having found on enquiry, that, among the various persons bearing the name of *Parker* at *Oxford*, Mr. *Parker* of the *High-street* was well known for his respectability, they direct the parcel to him; and the very use of the address, added to the name, was to insure a requisite degree of caution; for the parcel was not directed to *J. Parker, Oxford*, but to Mr. *James Parker, High-street, Oxford.*

When the parcel arrived, the carrier very well understood that it was his duty to deliver it as directed; and it had been the course of his office to deliver parcels at the house of the consignees. This Mr. *Parker* of the *High-street* had received goods from them at his house; indeed, the porter of the office met Mr. *Parker* himself, and upon saying he had a parcel, was expressly told by *Parker*, that he expected none, and knew nothing about it.

I stated to the jury that the duty of carriers might be different under different circumstances. A parcel might be directed to be left till called for; it might

 be

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be directed to a consignee at a large town, without the name of any street, as was the case in a cause before *Abbott* J. (*a*), where the parcel was directed to "*J. Worthy, Exeter*;" and where the carrier, having delivered it, on payment of the carriage, to one who told him that he had been sent for it by a person whom he did not know, but who was in the street, was holden to be chargeable with the consequences of gross negligence, though the goods were above the value mentioned in the public notice, and although they had not been specially insured and entered. But I told the jury that I would not enter into cases of difficulty, because, here, the parcel was not so directed, but was directed to be delivered at a particular place. So that the jury had only to consider, whether the carrier was guilty of gross negligence in not delivering the parcel at that place; for it is clear, from a case in 4 *Price* (*b*), that the carrier is bound, not only safely to convey, but safely to deliver a parcel at the place to which it is directed. (*c*) Now, after the attention of the porter had been drawn to the circumstances of the case, after Mr. *Parker*, of *High-street*, had refused the parcel, and the carrier was required by a person calling himself *Parker*, whose residence was unknown to him, to deliver the parcel, ought he not to have paused, and to have enquired on what authority the stranger made such a demand? I said, if this was not negligence, there must be an end of carrying for hire; for who would be safe, if a carrier is to deliver to a person, whose residence is unknown to him, a parcel directed to a known place of residence? I therefore thought this a case of gross negligence; but I did not leave it to the jury as a case of gross negligence, without explaining to them what gross negligence was, and I explained

(*a*) *Birkett* v. *Willan*, 2 *B.* & *A.* 356.

(*b*) *Bodenham* v. *Bennett*, 4 *Price*, 31.

(*c*) Per *Wood* B., *Bodenham* v. *Bennett*.

it

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it to them in the very words of my Brother *Best*, who observed that such an explanation had been omitted by my Brother *Bayley*, in *Batson* v. *Donovan*.

The jury were clearly of opinion that the carrier was guilty of gross negligence. I did not minutely direct the attention of the jury to the point touching notice, nor did I detail the evidence as to what passed after the loss, thinking observation on these points unnecessary after proof of gross negligence.

PARK J. The chief ground of the application for a new trial is, that evidence of matters which occurred subsequently to the delivery of the parcel, was not distinctly pointed out to the notice of the jury; but I think that this was unnecessary, because, whatever the opinion of the Plaintiffs might have been as to their right of recovery against *A.* or *B.*, the real question was, whether the Defendant and his servants had been guilty of gross negligence in the delivery of the parcel; if they were guilty of gross negligence, the opinions of the Plaintiffs would not destroy their case. The objection made to the Plaintiff's right of action, on the ground that the property in the goods had passed out of him to the consignee, does not apply to a case bottomed in fraud, in which there has been no sale. I think that the case was properly left to the jury, and that they have properly concluded, that this was a case of gross negligence.

BURROUGH J. Carriers are constantly endeavouring to narrow their responsibility, and to creep out of their duties; and I am not singular in thinking that their endeavours ought not to be favoured. The question here is, whether there was gross negligence. I think there was, and I am of opinion that the case was pro-

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perly left to the jury, and that they have given a proper verdict.

RICHARDSON J. I am satisfied both as to the law and the facts of this case. There was clearly a property in the Plaintiffs, entitling them to sue, as they had been imposed on by a gross fraud. With respect to the direction to the jury, there was, I think, gross negligence on the part of the carrier; nor do I think that the letters or conversations of *Brooks* amounted to a waiver of the right of the Plaintiffs to recover the value of the parcel from the Defendant.

Then, as to notice of the value of the parcel, such notice may be material in certain cases; as it was in *Batson* v. *Donovan*, where a great value was contained in a small compass, the parcel consisting of bills, cheques, and notes, to the value of 4072*l.*; but here the parcel was bulky, and not of any extraordinary value: it was directed, not generally, but to a specific place; and the carrier is bound to exercise equal diligence in all cases, and to deliver the parcels intrusted to his care according to direction.

Rule refused.

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BOASE *v.* JACKSON.

Jan. 26.

Demise to *A.* of a slate pit at *B.*, and stone quarries at *C.*, to hold to *A.* the slate pit at *B.* from the 25th *March*, 1815, for the term of fourteen years, and the stone quarries at *C.* from the 29th *Sept.* 1817, for the term of fourteen years, paying for the slate pit the yearly rent of 70*l.*, and for the stone quarries the yearly rent of 130*l.* The *ad valorem* stamp on the first skin of the lease was 3*l.*, with a progressive duty of 1*l.* on the other skins. It appeared that possession could not be given of the stone quarries at the same time with the slate pit, nor till the time mentioned in the lease. The Court being of opinion that no fraud was intended: Held, that this lease was properly stamped under 55 *Geo.* 3. *c.* 184.

COVENANT. At the trial of this cause, before *Dallas* C. J. (*Middlesex* sittings after *Michaelmas* term last) a lease was produced, by which the Plaintiff demised to the Defendant a slate pit or slate quarry, at the north end of *Swithland*, and also certain stone quarries in or upon *Mount Sorrel Hills* in the county of *Leicester*, to hold to the Defendant from the respective periods thereinafter mentioned; *viz.* the slate pit situate at *Swithland*, from the 25th *March*, 1815, for the term of fourteen years, and the stone quarries at *Mount Sorrel Hills*, from the 29th *September*, 1817, for the term of fourteen years thence next ensuing, paying, in respect of the slate pit in *Swithland*, the yearly rent of 70*l.*, and paying, in respect of the stone quarries and premises at *Mount Sorrel Hills* and *Mount Sorrel*, the yearly rent of 130*l.* It appeared that there had been some dispute, whether the Defendant or some other person was to have the stone quarries, and that possession could not be given till the time mentioned in the lease. The *ad valorem* stamp on the first skin of the lease being 3*l.*, with a progressive duty of 1*l.* on the other skins (a sufficient duty on the aggregate amount of the two rents reserved), the counsel for the Defendant objected, that, as the lease contained two *reddendums* for distinct properties at different rents, for different terms of years, to commence and conclude at different periods, the stamp duties to which the two

rents

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rents would have been subject, had they been reserved by different instruments, should have been imposed on this lease; in which case the rent of 70*l.* would have been subject to the *ad valorem* duty of 1*l.* 10*s.* on the first skin, and the rent of 130*l.* would have been subject to an *ad valorem* duty of 2*l.*; and that, therefore, the lease was not properly stamped, as required by stat. 55 *Geo.* 3. *c.* 184. The jury found a verdict for the Plaintiff, *Dallas* C. J. having reserved the point for the opinion of this Court. And now,

Vaughan Serjt. moved to set aside this verdict and enter a nonsuit, on the grounds above mentioned; but the Court saying that no fraud was intended, and that the whole was manifestly one transaction, rejected the application.

Vaughan took nothing by his motion.

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COCKELL and Another *v.* GRAY and Another.

Covenant to pay (among other instalments), an instalment within twelve *calendar* months from, &c. On the record the word "calendar" was omitted; but the record stated correctly the time of payment of other previous and subsequent instalments, without omitting the word "calendar:" Held, that this was no variance.

COVENANT to pay (among other instalments) an instalment of two shillings in the pound, within twelve *calendar* months from the date of the deed. On the record the word "calendar" was omitted, but the record stated correctly the time of payment of other previous and subsequent instalments, without omitting the word "calendar." At the trial, before *Dallas* C. J. (*London* sittings after *Michaelmas* term last) the jury found a verdict for the Plaintiffs, the learned Judge giving leave to

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the Defendants to move to set it aside and enter a nonsuit. Accordingly,

Pell Serjt. now rested his motion, on the ground, that "months" in law were to be considered as lunar months, and that the omission of the word "calendar" in the record, constituted a fatal variance; and he cited *Jocelyn* v. *Hawkins*. (a) But,

The Court held, that the meaning of the word "month" must depend on the intention of the parties, and they adduced many instances, in commercial matters, where a calendar month was always intended; as in bills of exchange payable so many months after date, or in insurances effected for six months; and thinking that the parties to this deed clearly intended calendar months, they refused to disturb the verdict; and *Pell* took nothing.

Rule refused. (b)

(a) 1 *Str.* 446. And see *Lacon* v. *Hooper*, 6 *T. R.* 224. *Bishop of Peterborough* v. *Catesby*, *Cro. Jac.* 166. *Barksdale* v. *Morgan*, 4 *Mod.* 185. *Rex* v. *Adderley*, *Doug.* 463. *Rex* v. *Peckham*, *Carth.* 406.

(b) See *Lang* v. *Gale*, 1 *M. & S.* 111. and *Titus* v. *Preston*, 1 *Str.* 652.

Feb. 4.

WHITELEGGE v. RICHARDS, Gent.

An order drawn up in the name of the Court, by an officer of a court of justice, is, until amended or set aside, the order of the Court. Therefore, where an officer of the Insolvent Debtors' Court, instead of drawing up an order for the further imprisonment of an insolvent, pursuant to the decision of the Court, drew up an order for his discharge, and the insolvent was thereon discharged, the order not having been amended or set aside: Held, on demurrer to the declaration, that no action lay by a creditor of the insolvent against the officer, though the declaration stated that the officer *wrongfully*, falsely, and unlawfully, made out and issued such order, *purporting* to be an order from the Court.

THE declaration stated that the Plaintiff, on the 24th *October*, in the first year of the King, in the Court of Common Pleas at *Lancaster*, recovered against *Strettell Chorlton* 90*l.* 11*s.* 4*d.*, damages and costs; that on the 21st *June*, in the year aforesaid, in the said court, (the said action then depending in the said court,) upon application of *Strettel Chorlton*'s bail to surrender their principal, it was ordered by the Court, that *Strettell Chorlton* should be forthwith committed to the custody of the keeper of the gaol of the county of *Lancaster*, as to the said action, and that his bail from their recognizance should be wholly discharged; and *Strettell Chorlton* was thereupon committed to the custody of the said keeper, as to the said action, and remained in his custody as to the said action from thence until the discharge of *Strettell Chorlton*; that *Strettell Chorlton* being so in custody, on the 7th *November*, 1820, applied, by petition, to the Court for relief of Insolvent Debtors, for his discharge from such confinement, according to the provisions of the act in such case made and provided; and that the Court for relief of Insolvent Debtors, on the 13th *November*, in the year aforesaid, ordered that the said prisoner, instead of being brought before the Court for relief of Insolvent Debtors for final examination touching the matters of his petition and schedule, should be examined touching the matters aforesaid before his Majesty's justices of the peace for the county of *Lancaster*, in open court, at the adjourned general quarter sessions of the peace at *Lancaster*, on the 2d *January*

then

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then next; and, in case it should appear to the justices upon such examination, or by evidence, that the prisoner was entitled to the benefit of the act, then that the justices should so declare and adjudge, and should certify the same to the Court for relief of Insolvent Debtors; and that, in case it should appear to the justices by such examination, or by evidence, that the prisoner had contracted any debts, against which he should seek to be discharged, fraudulently, or without any reasonable or probable expectation, at the time of contracting the same, of being able to pay the same, or should, with intent to conceal the state of his affairs, or to defeat the objects of the said act, have destroyed, or otherwise wilfully prevented the production of any books, &c. relating to such of his affairs as were subject to investigation under the act, or should have kept or cause to be kept, false books, or made false entries, or have wilfully and fraudulently altered or falsified any such books, papers, or writings, or should, in any respect, have been guilty of fraud in contracting, discharging, or concealing any debt due from the prisoner to any of his creditors, or should have fraudulently made away with, charged, mortgaged, or concealed any part of his property, of what kind soever, either before or after the commencement of his imprisonment, for the purpose of diminishing the sum to be divided among his creditors, or of giving an undue preference to any of the said creditors, or that the said prisoner should have put any of his creditors, as should have proved their debts, to unnecessary expense by any vexatious or frivolous defence, or improper delay in any suit for recovering the same, or that the said prisoner should have wilfully or fraudulently omitted any effects or property whatever, to the value of not less than 20*l.* in the whole, in the schedule, which the said prisoner should first have delivered into that court, then such justices should so declare

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declare and adjudge; and should also declare and adjudge, in like manner, and subject to the same limitations as are in the act mentioned and imposed in such cases upon the Court for relief of Insolvent Debtors, for what period of time the prisoner should remain in actual custody, before he should be discharged from custody, by virtue of the said act, and that the justices should forthwith certify the same to the Court for relief of Insolvent Debtors; and if the said justices should be of opinion that the prisoner was so entitled to be discharged, it was further ordered, that the prisoner should, in open court, before the said justices, subscribe and take the oath annexed to the duplicate of the schedule, and should execute the warrant of attorney therewith sent, and sealed with the seal of the Court for relief of Insolvent Debtors; and it was further ordered, that the whole of the proceedings should be forthwith returned by the justices to that court. The Plaintiff then averred, that, at the adjourned general quarter sessions of the peace for the county of *Lancaster*, holden at *Lancaster*, on the 2d *January*, in the 1st year of *George* the Fourth, *Strettell Chorlton* was examined by the justices of the peace then and there assembled at the sessions in open court, according to the form of the statute; and afterwards, the justices certified to the Court for relief of Insolvent Debtors, that the prisoner had that day, pursuant to an order of the Court for relief of Insolvent Debtors and the said act, been examined before the justices there assembled in open court, at the then present general quarter sessions of the peace, touching the matters of his petition and schedule, mentioned in the order, and due proof having been made before the justices at the said time and place, of the service of the respective copies of the said order, and such other notices of such proceedings as were required by the 21st section of the said act, and by

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by the said order and rules of court thereto annexed; and the prisoner having in open court, before the justices, subscribed and taken the oath annexed to the duplicate of the schedule, and executed a warrant of attorney, as required by the 25th section of the said act, the said justices declared and adjudged the prisoner entitled to the benefit of the act, as to all the creditors of the prisoner, or persons claiming to be creditors, mentioned and described in the duplicate of the said schedule. But the justices further declared and adjudged, that the prisoner had contracted the debt due to the Plaintiff, mentioned in his schedule, without any reasonable expectation, at the time of contracting the same, of being able to pay the same; and also that he had put the Plaintiff, who had proved his debt in the manner required by the act, to unnecessary expense, by a frivolous defence, in an action at law, in the Court of Common Pleas, at *Lancaster*, for recovering the same: and the justices, therefore, also declared and adjudged, that such prisoner should remain in actual custody at the suit of the Plaintiff, for the space of two years, before such prisoner should be discharged from custody by virtue of the said act. The Plaintiff then averred, that the certificate was afterwards, in due manner, transmitted and delivered to the Court for relief of Insolvent Debtors, and that before and at the time when the certificate was so transmitted and delivered, the Defendant was, and still is, a clerk and officer of the Court for the relief of Insolvent Debtors, before then appointed by the same court; and that it was the duty of the Defendant, as such clerk and officer, to have written and issued a certain order of the Court for the relief of Insolvent Debtors, ordering and directing that the prisoner should be discharged from custody when and so soon as he should have been in such actual custody for the full period of time expressed in such certificate

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as aforesaid. Yet that the Defendant being such clerk and officer, not regarding the duty of his office, and intending to injure the Plaintiff, and to cause *Strettell Chorlton* forthwith to be discharged from such custody, without paying or satisfying the said damages and costs, and to deprive the Plaintiff of the means of recovering the same; whilst *Strettell Chorlton* remained in such custody as aforesaid, at the suit of the Plaintiff, for the cause aforesaid, and whilst the said damages and costs were wholly unsatisfied to the Plaintiff, on the 13th *January*, 1821, without any authority from the Court for relief of Insolvent Debtors, wrongfully, falsely, and unlawfully made out and issued an order, purporting to be an order from the Court for relief of Insolvent Debtors, dated the day and year last aforesaid, entitled in the matter of the petition of *Strettell Chorlton*, a prisoner in actual custody in the castle of *Lancaster*, seeking the benefit of the act passed for the relief of insolvent debtors, and directed to the keeper or gaoler of the said gaol or castle, and purporting thereby, that the said Court for relief of Insolvent Debtors, (upon reading a certificate that the prisoner had, pursuant to an order of that court, been heard and examined touching the matter of his petition and schedule mentioned in the said order, and declared and adjudged entitled to the benefit of the said act,) did order that the prisoner should be discharged from custody as to the Plaintiff at whose suit the prisoner was detained in the custody of the said keeper or gaoler; whereas in truth and in fact the Court for relief of Insolvent Debtors did not at any time pronounce any such order as last aforesaid, or give any authority to the Defendant to write, make out, or issue the same, by means whereof the last-mentioned order being, on the 16th *January*, 1821, exhibited to the keeper of the said gaol, *Strettell Chorlton* was thereupon forthwith

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forthwith discharged from custody, as to the said action, and suffered and permitted to go at large wheresoever he pleased, against the will of the Plaintiff; and that *Strettell Chorlton* did then and there go from and out of such custody wheresoever he pleased, the said damages and costs then and still being and remaining wholly unsatisfied to the Plaintiff, by means whereof the Plaintiff had been greatly injured, and hath lost all means of enforcing payment from *Strettell Chorlton*, of the damages and costs aforesaid.

The declaration contained four counts, in substance the same. Demurrer and joinder.

Vaughan Serjt. for the Defendant. The order stated in the declaration is the order of the Court, and not of the officer, and the officer is not responsible to any individual for its correctness, but only to the Court for the due discharge of his duties, since under the 21st section of the Insolvent Act the Court is directed to make the order, not the officer. Then, the declaration does not show that the Plaintiff has any interest in the detention of *Chorlton*, which can entitle him to sustain this action. By the Insolvent Debtors' Act (*a*) the principle of the common law is altered, the arbitrary discretion of a creditor to detain his debtor is taken away, and where the debtor has been guilty of misconduct, he is subjected to a judicial sentence, as in any other case of criminal misdemeanor; the Plaintiff, therefore, is not deprived of any remedy by this order, nor has he sustained any damage. The wrong complained of is not a wrong towards an individual; and a misfeasance of this kind affecting the administration of public justice cannot be the subject of an action. Perhaps, under a liberal interpretation of the 23d section of the Insolvent Act, which enables the Court to set aside an order fraudulently obtained, the Insolvent Debtors' Court might rescind this order

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and issue another; but the order, till set aside or rescinded, is still the order of the Court, the validity of which, this Court, having no jurisdiction in error over the Insolvent Debtors' Court, cannot dispute, and the Plaintiff might as well sue the Insolvent Debtors' Court itself, as the defendant, who is no more than the hand with which the commissioners act. There is no case in point. In *Smith* v. *Winford* (a), the Plaintiff did not enter the issue in due time.

Taddy Serjt. for the Plaintiff. The order in question is not pleaded as being an order of Court, but as *purporting* to be an order of Court, and by the demurrer it is admitted that it was no order. The Plaintiff has sustained an injury by this paper, which falsely purported to be an order, and the injury is averred in the declaration. The injury is the loss of that gage for the payment of his debt, which he possessed in confining the person of his debtor; for, as that confinement might ultimately induce the debtor to procure payment, the creditor has still an interest in the confinement, notwithstanding the operation of the Insolvent Debtors' Act. But the imprisonment under that act is not altogether penal, for the prisoner is directed in the act to be detained *at the suit of* the crėdtor (b), so that if the objections which have been made to this action are well-founded they would apply equally to an action of escape. But the law presumes, that a creditor may derive advantage from the imprisonment of his debtor; and the Defendant, who has wrongfully issued for the debtor's discharge a paper which is not an order of court, must be answerable for the Plaintiff's loss. Here too there is an allegation of malice, under the word *wrongfully*, (*Drewe* v. *Coulton* (c),) which, by the demurrer, is admitted to be true.

(a) *Lutw.* 96.
(b) *s.* 17.
(c) 1 *East*, 563. n.

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Vaughan, in reply. The Plaintiff has no interest in the debtor's detention, because all his effects, future as well as present, are assigned to his creditors; and detention with a view to obtain satisfaction, can only be of advantage where the debtor still retains property, which, by such means, he may be induced to transfer: so that this action cannot be considered in the same light as an action of escape, in which the Plaintiff obtains damages for the loss of a security in his debtor's person, which might ultimately have been beneficial to him. Malice is no part of the cause of action in such a case as the present, and would not form part of the proof at the trial; because the Defendant, if liable at all, is liable for the misfeasance, whether accompanied with malice or not. As to the prisoner's being detained *at the suit of* the creditor, that expression is only meant to operate as a designation of the person, and does not alter the penal nature of the imprisonment.

Cur. adv. vult.

And now,

DALLAS C. J. delivered the following judgment.

This case has been so recently before the Court, that it will be sufficient to refer to the pleadings as they appear on the face of it.

The question for our decision is, whether the declaration be substantially good?

In the argument at the bar, much has been gone into, and properly, which, however, upon the view we take of the subject, it will not now be necessary to consider.

It is sufficient to say, with reference to the single ground of our decision, that the Defendant, in each of the counts, is stated to have been, at the time of the act complained of, an officer of the Court of Insolvent Debtors, and, that it was his duty, as such, to draw up

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and issue orders of the Court, such orders when issued, deriving effect from the authority, and as the act, of the Court.

It must, or may occasionally happen to such officer, as to every person in a similar situation, to draw up rules and, orders erroneously; and, in every court, the instance is familiar of applications being made to amend rules and orders, so as to make them conformable to that which was originally pronounced, or to what originally the rule or order ought to have been.

But, until such application and further order thereon, the rule or order issued remains an act of the Court itself. In this instance no amendment or change has been made, and, not having been made, the order in question remains upon the face of it the order of the Court.

The declaration alleges, that the Defendant made, and issued a certain order, purporting to be an order of the Court; treating it, therefore, as an order, in itself, averring only, that, in fact no such order was made out; but, appearing to be an order, and being by the declaration averred as purporting so to be, we think it must be taken as such, not having been repudiated or disclaimed by the Court itself; and, consequently, that the action cannot be maintained.

To this point we confine our decision, not meaning to give any opinion, whether, under different circumstances, and if so, under what circumstances, such an action can be maintained. It is sufficient to say, that in this case there must be judgment for the Defendant.

Judgment for the Defendant accordingly.

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IN THE EXCHEQUER CHAMBER. (a)

The KING v. THOMAS WATTS.

Nov. 20.

THE prisoner was tried before *Best* J. at the last assizes for *Devon*. The first count of the indictment was for forging at *East Stonehouse*, on the 6th *April*, 1821, an acceptance by Messrs. *Williams* and Co., to a certain bill of exchange, as follows, viz.

The prisoner having promised in payment for some goods an acceptance by a *London* banker, gave a bill addressed to, and purporting to be accepted by, *Williams* and Co., No. 3, *Birchin-lane, London*; it was proved that *Williams, Burgess* and Co. of No. 20, *Birchin-lane*, had not accepted the bill, and that no other bankers of the name of *Williams* and Co. were known in *London*, but no evidence was adduced to shew that *Williams* and Co. of No. 3, *Birchin-lane*, had not accepted the bill; Held, that there was no forgery proved against the prisoner, by ten Judges against one, *Bayley J. absente*.

No. 117. 200*l*.

March 28th,
Swansea Bank, 1821.

Two months after date, pay to Mr. *John Tipper*, or order, two hundred pounds for value received.

Hy. Williams and Co.

To Messrs. *Williams* and Co.
Bankers, *Birchin Lane*, *London*.
3

With intent to defraud *Thomas Baylis*, *John Routledge*, and *Jonathan Ramsay*.

The second count was for uttering and publishing as true the said forged acceptance on the said bill of exchange, knowing the same to be forged, with a like intent.

He was acquitted on the first, and convicted on the second count.

It was proved, that, in *April* last, the prisoner purchased of the prosecutors, wheat to the amount of 240*l*. At the time he made the purchase, he agreed to pay by

(*a*) The publication of this case, which was decided in *Hilary* term last, was unavoidably postponed till the present time.

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the acceptance of a *London* banker. Before the wheat was delivered to him, he produced to the prosecutors a bill in these words and figures:

No. 117. 200*l.*

March 28th,
Swansea Bank, 1821.

Two months after date, pay to Mr. *John Tipper*, or order, two hundred pounds for value received.

H. Williams and Co.

To Messrs. *Williams* and Co.
Bankers, 3, *Birchin Lane*, *London*.

3

Accepted, *Williams* and Co.

He was asked how he proposed to pay the remainder of the money, and said he would draw on the same bankers for the balance; he then drew the following bill in the prosecutors' compting house.

40*l.*

South Tawton, *April* 6th, 1821.

Two months after date, pay to our order forty pounds for value received, as advised by

Swansea Bank. *Thomas Watts*,
For *P. Watts* and Co.

To Messrs. *Williams* and Co.
Bankers, *Birchin Lane*, *London*.

3

Accepted, *Williams* and Co.

He said he would send this bill to *London* to get it accepted. It was afterwards sent back to the prosecutors, accepted as it now appears.

Whilst he was drawing the bill, one of the prosecutors asked him, if *Williams* and Co. the acceptors, were *Williams*, *Burgess*, and Co. The prisoner said, the acceptors

ceptors were *Williams*, *Burgess*, and Co. Prosecutor said it was improbable there should be two firms of the same name in the same street, and prisoner answered it was improbable. The figure 3, which stands between the words bankers and *Birchin Lane* in the 200*l*. bill, was not then on the bill. The witnesses did not observe whether the small figure 3 in the corner was on the bill at this time. It appeared to a witness acquainted with bills, not to be a part of the address, but was like a figure that the holders of bills sometimes put on them before they leave them for acceptance. But the person who presented this bill had not observed whether it was on the bill when he presented it for payment or not. A person to whom he presented the bill, at the house No. 3, *Birchin Lane*, took this bill behind a desk, and had an opportunity of writing on it one or both of these figures.

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But the person who presented it did not observe, when he received the bill back, whether either of these figures were then on it.

There are *London* bankers at No. 20, *Birchin Lane*, of the names of *Williams*, *Burgess*, and Co., who usually accept bills in the firm of *Williams* and Co. This bill was not accepted by that firm. No other bankers of the names of *Williams* and Co. were known to carry on business in *Birchin Lane*, nor were there any other *London* bankers under that firm. The words "*Williams* and Co." were on a brass plate on the door of No. 3. There was no evidence to shew by whom these bills were accepted.

The prisoner proved that three bills in the following form had been paid at No. 3, *Birchin Lane*, *viz.*

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No. 345. 30*l.*

South Tawton, March 5th, 1821.

Two months after date, pay to our order thirty pounds for value received.

Thomas Watts,
For *P. Watts* and Co.

Messrs. *Williams* and Co.
Bankers, *Swansea.*

Accepted, Messrs. *Williams* and Co.
payable at No. 3, *Birchin Lane, London.*

BEST J. left it to the jury to say, whether the acceptance of the 200*l.* bill was the acceptance of any *London* bankers.

The question for the opinion of the Judges was, whether the prisoner was properly convicted. There was also a further question, *viz.* whether, considering the manner in which the bill is stated in the indictment, it was necessary for the prosecutors to prove, that the 3 in the corner was on the bill when it was tendered in payment.

Williams C. F. for the prisoner. No evidence has been adduced to shew, that the acceptance which the prisoner is charged with having forged, was not the acceptance of those persons whose acceptance it purports to be; namely, the acceptance of *Williams* and Co. of No. 3, *Birchin Lane*; if the acceptance was written by them, the circumstance of their not being bankers would not render the prisoner guilty of a forgery. The jury indeed have found that he did not forge the acceptance, and even wilful misrepresentation made after the uttering a bill, will not render that a forgery which was not so at the time when the bill was drawn. *Rex* v. *Webb* (*a*), *Walker*'s case (*b*), *Hevey*'s case. (*c*) Secondly, there is a vari-

(*a*) Coram *Best* J. *Sarum*, 1819. See a statement of the case, and decision in *Cam. Scacch.* post.

(*b*) *Russell*, 1420.

(*c*) 2 *East*, *P. C.* 856.

a variance in the setting out of the bill on record, no evidence having shewn that the bill when uttered contained the figure three stated on the record. Thirdly, it ought not, for the reason before stated, to have been left to the jury, whether or no this was an acceptance by *London* bankers.

Gaselee for the crown, cited *Mead* v. *Young* (a), and *Parkes* and *Brown*'s case (b), as in point; and distinguished *Walker*'s case.

Williams was heard in reply.

No judgment was given, but the prisoner received a free pardon.

** Eleven Judges were present, of whom ten were of opinion that this case did not amount to forgery. They gave no opinion upon the point of variance, their judgment on the first point rendering that unnecessary. (c) *Bayley* J. was absent at Chambers.

(a) 4 *T. R.* 28.

(b) 2 *Leach*, 775. 2 *East*, *P. C.* 963.

(c) The Reporters are indebted to one of their Lordships, who was present, for this information.

The KING v. MANASSEH GOLDSTEIN.

Feb. 4.

The forgery of a *Prussian* treasury note for one dollar is within the statute 43 *Geo.* 3. *c.* 139. *s.* 1.

The prisoner was convicted of forging an instrument (purporting to be a *Prussian* treasury note), in a foreign language. No count in the indictment containing any *English* translation of the note, the Court arrested the judgment on that ground, By eight Judges against two, *Wood* B. & *Bayley* J. *absentibus*.

AT the *Old Bailey* sessions, *September*, 1821, the prisoner was convicted before *Richardson* J., on the stat. 43 G. 3. *c.* 139. *s.* 1., of falsely making, forging, and

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and counterfeiting, and causing and procuring to be falsely made, forged, and counterfeited, a certain promissory note for the payment of money, purporting to be the promissory note for the payment of money of a certain foreign prince, that is to say, *Frederick William*, king of a certain foreign country called *Prussia*, with intent to deceive and defraud the said *Frederick William* against the form of the statute.

In other counts, the instrument was stated to be a certain promissory note for the payment of money, purporting to be the promissory note for the payment of money of *Altenstein*, known by the name and description of baron *D' Altenstein*, he the said *Altenstein*, being a minister entrusted by and in the service of the said *Frederick William*, so being such foreign prince as aforesaid, with intent to deceive and defraud the said *Frederick William*.

In other counts, the said *Altenstein* was stated to be "a *person* resident in a certain foreign country called *Prussia*." And, in other counts, the intent charged was to deceive and defraud the said *Altenstein*.

In another set of counts, the instrument was stated to be "an undertaking for the payment of money;" and in another set, "an order for the payment of money."

The instrument was set out on the record: and, in one set of counts, was stated to be in the *German* language; in another set, to be partly *German* and partly *French*; and, in a third set, the particular language was not averred.

No count contained any *English* translation. It was proved at the trial, that these instruments are notes (or receipts) issued by the *Prussian* treasury, signed (*in fac simile*) by baron *Altenstein*, the *Prussian* minister of finance: that they are not only received by the *Prussian*

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Prussian government, in payment of all duties and taxes, but that any holder may, and often does, receive payments for them in cash on presenting them at the treasury offices established at *Berlin*, *Konigsberg*, and *Breslaw*; and that they pass as current money for all purposes throughout the *Prussian* dominions. (*a*)

This instrument, being translated by a witness, appeared to be, in *English*, as follows:

ON THE FRONT SIDE.

No.

"Treasury note (*b*) of One Dollar in currency according to the standard of 1764, valid in all payments in full.

ALTENSTEIN."

ON THE REVERSE SIDE.

Treasury Note (*c*)

in Currency.

F. R.
W.

of

One Dollar

Office of Realization (*d*) at *Konigsberg*.

(*a*) An impression of the false instrument stated in the indictment accompanied the case submitted to the learned Judges. It was a moderate sized ticket, ornamented with engraved patterns, and was in the *German* language, with the exception of the words "realisations comptoir."

(*b*) Or receipt, the *German* word "*schein*" signifying either "note" or "receipt."

(*c*) Or receipt.

(*d*) Or payment.

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The last words, which, in the original, were "Realisations comptoir zu *Konigsberg*," were printed in red ink, and in the *French* character; but the witness said, that the phrase "Realisations comptoir" was adopted into the *German* language.

The same witness, on cross-examination, stated that, in *German*, he should call an undertaking to pay money or promissory note; "*schuld-schein*," which literally means "receipt for a debt," and that the word "*schein*" alone does not import a promise to pay.

It was clearly proved, that the prisoner, a *German* Jew, residing at *Shadwell*, having a correspondence with some persons in *Prussia*, and having in his possession a genuine note, had caused plates to be engraved, and many thousands of false notes to be struck off, in the city of *London*.

The evidence being closed, *Platt* for the prisoner, objected that the instrument stated in the indictment was not, nor did it purport to be a promissory note, or an undertaking to pay money, or an order to pay money: and that it contained no words of promise, undertaking, or order. He cited *Mary Michell*'s case (*a*), *Williams*'s case (*b*), *Clinch*'s case (*c*), and *Jones*'s case (*d*), decided on the stat. 7 *Geo.* 2. *c.* 22. respecting orders for payment of money, and argued from thence, that an order for payment of money must contain words importing a command, and must purport to be signed by some person having, or, at least, claiming to have authority to command such payment. He also cited *Hunter*'s case (*e*), and *Thompson*'s case (*f*), which were decided on the stat. 2 *Geo.* 2. *c.* 25. respecting receipts for money, to shew that the signature of a name alone, or

(*a*) *Foster*, 119. *East*, *P. C.* 936.

(*b*) *Leach*, 114. 4th edit. *East*, *P. C.* 937.

(*c*) *Leach*, 540. *East*, *P. C.* 938.

(*d*) *Leach*, 53. *East*, *P. C.* 941.

(*e*) *Leach*, 624. *East*, *P. C.* 928.

(*f*) *Leach*, 632. *notis.*

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the word "settled" alone, could not be set out in an indictment for forgery as a receipt for money; although it might operate as such, without other matter connected with it by proper averments, so as to shew that the whole matter taken together, purported on the face of it to be a receipt for money. He also cited *Reading's* case (*a*), to shew that *John Ring* could not purport to be *John King*: and he observed that the effect of the instrument, when presented for payment at the treasury at *Berlin*, could not vary its purport.

RICHARDSON J. overruled the objection, being of opinion, that this act of parliament, made to prevent the forgery in *Great Britain* of foreign securities, could not be understood to require, that these securities should possess the technical properties required by the municipal law of *England*; but that it was sufficient, if they imported, on the face of the whole instrument, an undertaking or order for the payment of money, which the learned Judge thought was the case with the instrument in question. The learned Judge was also inclined to think, considering the peculiar wording of the act, that it was sufficient, if the instrument was in fact an undertaking or order for the payment of money, and operated as such, (which appeared by the evidence to be the case here,) and that it purported to be issued by any foreign prince or his minister, the word "purporting" in the act appearing to the learned Judge to refer rather to the person by or on whose behalf the instrument was issued, than to the form of the instrument itself.

The jury found the prisoner guilty.

The next day, *Platt* moved in arrest of judgment, on the ground that the false instrument was here set out

(*a*) *Leach*, 590. *East*, *P. C.* 981.

only

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only in a foreign language, and not translated or explained by averments on the record: that the object of setting out the instrument in cases of libel and forgery is, that the court which tries, and also a court of error may judge whether it be what it is alleged to be, and whether it falls within the act or law on which the prosecution is founded; which functions the Court could not exercise in the case of a foreign instrument not translated or explained by averments, because the Court could no more take judicial notice of the meaning of *German* or *French*, than of *Arabic* or *Chinese*. He cited *Zenobio* v. *Axtell* (a), where it was holden that the translation of a foreign libel, without the original, would not suffice, and argued that the converse was equally true. He also cited *Lyon*'s case (b), *Lloyd*'s case (c), *Gilchrist*'s case (d), and *Reading*'s case (e), to shew that indictments have been held insufficient, because the instrument set out did not, in the opinion of the Court, agree with the purport ascribed to it, of which advantage this prisoner was deprived, by setting out the instrument only in an unknown language. He also mentioned the stat. 4 *Geo.* 2. *c.* 26. *s.* 1., which requires all instruments to be in the *English* language, as fortifying the argument, that every thing material must be stated or explained in that language.

Richardson J. expressed no opinion on this point, having resolved to submit it, and also the objection made at the trial, to the opinion of the learned Judges.

Both points were accordingly now submitted to their opinion, and the judgment was, in the meantime, respited.

(a) 6 *T. R.* 162.

(b) *Leach*, 597. *East, P. C.* 933.

(c) *Leach*, 608. *notis*.

(d) *Leach*, 657. *East, P. C.* 982.

(e) *Leach*, 590. *East, P. C.* 981.

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Plat for the prisoner, on the first point, in addition to the authorities adduced by him at the trial, cited *Reeve*'s case (*a*), and *Rex* v. *Lockett*. (*b*)

As to the second objection, he cited in addition the stat. 45 *Geo.* 3. *c.* 89., and *Mason*'s case (*c*), to shew the accuracy which the law required in the specification of instruments like that laid in the indictment; and *Hudson*'s case (*d*), to shew the necessity of the Judges being enabled to decide on the face of the instrument, whether or not it was within the act. He distinguished the cases of libel in *Welsh*, (*Craft* v. *Boite* (*e*),) on the ground that the Court is bound to take cognizance of the dialects of *Great Britain*. (*f*)

If it were urged, that the Judges would inform themselves of the translation if they could, the signification of the word "*schein*" would be found to signify "the act of shining," "lustre," "appearance," not a reality. (*g*) The addition of the word "*tresor*" only takes away the generality of "the act of shining," &c. and confines it to "the treasury;" but does not alter the signification of the word "*schein*" so as to bring it within the act.

Law C. for the crown, having argued that this instrument would, in *England*, be deemed a promissory note, undertaking, or order for the payment of money, and that it might be laid as such in the indictment, the form of words employed in such instruments being imma-

(*a*) 2 *Leach*, 808. *East*, *P. C.* 984. *notis*.

(*b*) *East*, *P. C.* 940. *Leach*, 94.

(*c*) *Leach*, 487.

(*d*) *Leach*, 978.

(*e*) 1 *Wms. Saund.* 242. n. 1.

(*f*) *Hob.* p. 126. pl. 157.

(*g*) *Noehden's Germ. Dict.* word *schein*. *Minsheu's Dict. of Eleven Tongues*, word *shine*.

terial;

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terial; [for which he cited *Shepherd's* case (*a*), *Lockett's* case (*b*), *Willoughby's* case (*c*), *Morris* v. *Lee* (*d*), 8 *Mod. Rep.* 364., the definition of a bill or note in *Bayley on Bills* (*e*), and the stat. 3 and 4 *Anne*, *c.* 9. *s.* 1.] urging, that the note being averred to be for payment of money, as in *Elliot's* case (*f*), it was therefore averred, that *valid in payments* meant payable; and having argued, that it must from its purport be deemed in *Prussia* to be an undertaking for the payment of money, the purport of an instrument being what appeared to be its object on the face of it; for which he cited *Edsall's* case (*g*), distinguishing *Jones's* case, *Redding's* case, and *Gilchrist's* case; and referring to *Reeve's* case (*h*), [in which *Heath* J., *Lawrence* J., and *Thomson* B., held that a scrip receipt signed *C. Olier*, was well laid, purporting to be signed *Christopher Olier*, because the indictment was not on the face of it repugnant to the bill, or inconsistent with itself, and the ambiguity was explained by evidence;] and to *Elliot's* case (*i*), [in which it was found by the jury, and that finding approved, that 50*l.* meant fifty pounds;] *Abbott* C. J. stopped him, saying, that all the Judges present were satisfied, that the instrument was one upon which forgery might be committed under the statute; and he was desired to address himself to the objection, that no translation of the instrument appeared on the record, when he argued to the following effect.

It is not necessary, that the translation of the instrument should appear on the record, and this may be contended both upon principle and upon the authority of the cases.

(*a*) *East, P. C.* 944. *Leach*, 226.
(*b*) *East, P. C.* 940. *Leach*, 94.
(*c*) *East, P. C.* 944.
(*d*) Ld. *Raym.* 1396.
(*e*) Pp. 1. 3.
(*f*) *Leach*, 175.
(*g*) *East, P. C.* 984. *Leach*, 662. n.
(*h*) *East, P. C.* 984. n. *Leach*, 813.
(*i*) *Leach*, 175.

And

And first upon principle. It is argued, that the tenor must be set out, and, the tenor being unintelligible in a foreign language, that a translation is necessary. But the translation would not supply the tenor. The purport of an instrument, and the law which gives it a peculiar character in a foreign language and country, are matters of evidence. No translation could supply several peculiarities on the face of the forged instrument, without which it would not be a resemblance of the genuine instrument. A variety of engravings, cyphers, and symbols which appear on it, are incapable of translation: the crown for instance, and the initials of the king of *Prussia*. These peculiarities form tokens well understood, and are necessary to constitute a resemblance to, and give it the character of an order for the payment of money of the king of *Prussia* or his minister. The explanation of these peculiarities can be supplied by evidence alone. The instrument itself would convey to the mind of a *Prussian*, the authority of the king and order of his minister. The translation might convey a very limited and perhaps erroneous view of the obligation or authority which the whole matter on the face of the instrument imported. The instrument is set out; the authority is averred, by which it becomes an order; the words of the statute are strictly followed, and a translation would not advance the matter.

Translation of such instruments might mislead. Suppose a *French* bill of exchange, exactly corresponding, when translated, with an *English* one. It is not necessary or usual to state in an *English* bill, in what the value is received; but it is otherwise in a *French* bill. The Court, looking at the translation of such a supposed *French* bill, would pronounce it valid: it would appear unobjectionable; but, inasmuch as it would not state upon the face of it the nature of the consider-

 ation,

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ation, it would be, by the law of *France*, the law on which its validity depends, an absolute nullity. (*a*)

Neither is the translation necessary according to the authority of the cases. The analogy which the present case bears to a case of libel is not very obvious; but, admitting the analogy, the case of *Zenobio* v. *Axtell* was a decision, only, that the original or tenor must be set out. Libel, however, is slander reduced to writing, and the cases of slander are express, to shew that translation is not required. Serjt. *Williams*'s note to *Craft* v. *Boite* (*b*) *Hobart's Rep.* (*c*), 1 *Rol. Abr.* (*d*), *Ross* v. *Lawrence*. (*e*)

Platt was heard in reply.

*** Of the ten Judges who were present (*Wood* B. being absent from illness, and *Bayley* J. being at Chambers), all save two were of opinion that the judgment ought to be arrested on the last point. And the judgment was arrested accordingly. (*f*)

(*a*) *Manuel de droit François, par J. B. J. Pailliet*, p. 1002. *cinquième édit.*

(*b*) 1st *Wms. Saunders*.

(*c*) 126.

(*d*) 86. (L) *pl.* 5.

(*e*) *Styles*, 236.

(*f*) The Reporters are indebted to one of their Lordships who was present for this information.

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RUSSELL and Another v. MOSELEY.

Feb. 6.

"I hereby guarantee the present account of H. M. due to R. T. S. of 112*l*. 4*s*. 4*d*. and what she may contract from this date to the 30th *Sept*. next," (signed and dated): Held, that the consideration sufficiently appeared on the face of this instrument under 29 *Car*. 2. *c*. 3. *s*. 4.

ASSUMPSIT on the following guarantee.

London, 26th *April*, 1816.

"I hereby guarantee the present account of Miss *Harriet Moseley*, due to *R. T. Shortridge* and Co., *South Shields*, of 112*l*. 4*s*. 4*d*., and what she may contract from this date to the 30th *September* next.

"*G. B. Moseley*."

At the trial before *Dallas* C. J., (*London* sittings after *Trinity* term last,) the Plaintiffs were non-suited with liberty to move to enter a verdict, if the Court should be of opinion that the Plaintiffs were entitled to recover on the guarantee. Accordingly,

Hullock Serjt. having in the last term obtained a rule *nisi* to that effect, when he distinguished this case from *Jenkins* v. *Reynolds* (*a*) and *Saunders* v. *Wakefield* (*b*), contending that the consideration for the promise appeared on the face of this guarantee,

Vaughan Serjt. now shewed cause against the rule, and argued that the consideration did not appear with certainty; but that, to reduce it to certainty, it would be necessary to resort to parol evidence, the very mischief against which the statute of frauds was pointed. He cited *Saunders* v. *Wakefield*.

But the Court were of opinion, that the consideration sufficiently appeared on the face of the instrument, and the rule was made

Absolute.

(*a*) *Ante*, iii. 14. (*b*) 4 *B.* & *A.* 595.

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Feb. 6.

Gregory v. Hurrill.

In an action in the Common Pleas, the question being, whether a debt was barred by the statute of limitations, the creditor proved an action commenced in the King's Bench six years before, and continuances regularly entered down to the term before the trial of the action in C.P.: Held that the debt was not barred.

THIS was an action of trover, brought under an order of the Vice-Chancellor, by the Plaintiff, *Gregory*, against the Defendant, his assignee, to try the validity of the commission issued against *Gregory*.

The cause was tried before *Dallas* C. J. at the *London* sittings after last *Trinity* term, when the Plaintiff, *Gregory*, having relied on the statute of limitations, to shew that there was no debt whereon the Defendant could support the commission, the counsel for the Defendant, in answer, produced an office copy of a roll in the court of King's Bench of *Michaelmas* term, 53 *Geo.* 3., 1812, containing an entry of three writs of *capias alias* and *pluries*, with continuances on the writs of *pluries*, brought down to the term before trial; and these proceedings, the Defendant's counsel contended, took the case out of the statute. It appeared afterwards, upon the motion for a new trial, that these proceedings in the King's Bench had gone no further; and that the Court of King's Bench had holden them to be regular. A verdict was found for the Plaintiff, with leave for the Defendant to move to set it aside, and enter a verdict for the Defendant, the Chief Justice having reserved the point of law raised by the Plaintiff's counsel, "whether the debt of the petitioning creditor was a good and legal debt to support the commission, or whether it was not barred by the statute of limitations."

Accordingly, *Vaughan* Serjt. having in the last term obtained a rule *nisi* to this effect,

Hullock Serjt. (with whom was *Lens* Serjt.) now shewed cause against the rule, and, after citing *Quantock* v. *Eng-*

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v. *England* (*a*), *Ex parte Dewdney* (*b*), and *Ex parte Roffey* (*c*), to shew that a debt barred by the statute of limitations could not constitute a good petitioning creditor's debt, argued that continuances in another action, and in another court, especially as the proceedings were never brought to a close, would not exempt an action in this court from the operation of the statute of limitations, and he likened the case to that of *Smith* v. *Bower* (*d*), where an attachment of privilege was holden not to be a continuance of a bill of *Middlesex* so as to avoid the statute of limitations.

Vaughan, contrà, was stopped.

DALLAS C. J. The main question is, whether there was in this case a good petitioning creditor's debt, and that depends on the continuances, and on their having been regularly entered. The Court of King's Bench have decided that they were regularly entered, and the only objection here is, that this is a different proceeding. But I think the proceedings on this debt in the other action sufficient to take the case out of the operation of the statute here.

RICHARDSON J. As long as a remedy was open by which the debt might have been recovered any where, it appears to me that it was not barred by the statute.

The rest of the Court concurring, the rule was made

Absolute.

(*a*) 5 *Burr.* 2628.
(*b*) 15 *Ves.* 479.
(*c*) 2 *Rose*, *B. C.* 245.
(*d*) 3 *T. R.* 662.

1822.

Feb. 8.

Doe Dem. Nicholson and Others v. Middleton and Another.

Where three commissioners and their successors were appointed to transact the business under an enclosure act, and the act of any two of them was to be valid, an assessment executed by two, after the death of one of the three, and before the appointment of a successor, was holden invalid.

EJECTMENT brought by the surviving commissioners of the *Gosforth* Inclosure Act (a), to recover from the Defendants (tenants of *Skeffington Lutwidge*,

(a) By which it is enacted, that *John Nicholson*, *John Litt*, and *Joseph Cowper*, and their successors, to be appointed as thereinafter mentioned, should be, and were thereby appointed commissioners for setting out, dividing, allotting, and inclosing the commons and waste grounds in the manner and according to the rules, &c. contained in the act and in the stat. 41 *Geo. 3. c.* 109. *s.* 29. (general inclosure act,) so far as the powers, &c. of the last-named statute were not altered or controlled by, or repugnant to, the *Gosforth* act, " and that all acts, matters, and things, done by any two of the commissioners appointed or to be appointed by virtue of this act, shall, to all intents and purposes, be as valid and effectual as if the same were done and performed by all the said commissioners."

And it is further enacted, that if any of the commissioners appointed by the act, or to be substituted in manner thereinafter mentioned, should die, or neglect, refuse, or become incapable to act for the space of 40 days, when occasion should require his or their attendance for carrying that or the recited act into execution, it should be lawful from time to time to elect and appoint a new commissioner or commissioners in the stead of him or them so dying, neglecting, refusing, or becoming incapable to act as aforesaid. The act then gave power to certain persons to nominate a new commissioner or commissioners in the place of the commissioners mentioned in the act, or any future commissioners, not interested in the enclosure, from time to time, as occasion might require; and in case such new commissioner or commissioners should not be appointed by the party or parties therein respectively authorised to make such appointment within 60 days after the happening of any such vacancy, and notice thereof given by the surviving and acting commissioners or commissioner for the time being in writing, then a commissioner or commissioners to fill up such vacancy or vacancies from time to time, " shall and may be appointed by the other surviving or acting commissioners or commissioner for the time being, by writing, under their or his hands or hand at any meeting

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DOE dem. NICHOLSON v. MIDDLETON.

Lutwidge, Esquire,) possession of two parcels of land, allotted by the commissioners, for the purpose of obtaining payment of the quantum of an arrear of charges and expenses of passing and carrying into execution the act of parliament. In the first count the demise was laid by *John Nicholson* and *Joseph Cowper*, on the 2d *February*, in the second year of the king. In the second count the demise was laid by *John Nicholson*, *John Litt*, and *Joseph Cowper*, on the 2d *September*, 55 *Geo.* 3. At the trial, before *Bayley* J. (*Carlisle* Summer assizes, 1821) it appeared, that *John Nicholson*, *John Litt*, and *Joseph Cowper*, were, by the act, appointed commissioners, and that, in *August*, 1815, the three commissioners duly signed their award, by which the parcels of land in question were allotted to the testator of the Defendant's landlord, who, since his testator's death, had received the rents. *John Litt* died shortly after the execution of the award, no new commissioner was appointed, and the two remaining commissioners, in *January*, 1821, made an assessment for certain costs and charges of carrying the act into execution, and gave notice thereof to Mr. *Lutwidge*. There was a nonsuit, with leave for the lessors of the Plaintiff to move to enter a verdict. Accordingly,

meeting of such surviving or only commissioners or commissioner, of the time and place whereof 14 days' previous notice shall have been given," &c. &c.

And it is also enacted, that in case the purchase monies arising by the sales mentioned in the act, should not be sufficient to defray all the costs, charges, and expenses, "then the deficiency thereof shall be made up by the several persons interested in the commons and waste grounds, and shall be paid in such shares and proportions, within such time, and to such person or persons, as the said commissioners shall direct, nominate, and appoint; and in case any person made subject to the payment of any money towards such costs, charges, and expenses as aforesaid, shall neglect or refuse to pay his or her share, or proportion thereof, within the time to be appointed as aforesaid, the same shall and may be levied and recovered in the manner directed by the said recited act."

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Hullock Serjt., in the last term, obtained a rule *nisi* to that effect; and now,

Taddy Serjt. opposed the rule, on the ground, that there were three commissioners appointed, representing three separate interests. One of these was dead at the time of the demand, and though two by the act would constitute a quorum, still it was necessary that three should be in existence at the time of any act done.

Hullock, in support of his rule, urged, that it was provided by the act, that "all acts, matters, and things done by any two of the commissioners" should be as valid and effectual, as if the same were done and performed by all the three.

But the Court were of opinion, that the act required the existence of three commissioners, whereas only two were alive at the time of the demand, and held *Taddy*'s objection fatal.

Rule discharged. (*a*)

(*a*) Another point was made in the case; but the Court decided expressly on the point above reported, and gave no opinion on the other.

1822.

RICHARD HENRY TOLSON, Esq. v. KAYE, M. D.

Feb. 9.

The 20 years within which a *formedon* in the *descender* ought to be commenced under the statute 21 *Jac.* 1. *c.* 16. begin to run when the title descends to the first heir in tail, unless he lie under a disability.

THIS was a writ of formedon in the descender, by which the demandant, in *Michaelmas* term, 2 *G.* 4., demanded of the Defendant certain messuages, &c., situate in the parish of *Wath-upon-Derne*, in the county of *York*, and, after reciting the writ, averred, that *Richard Tolson* and *Henry Tolson* were seised of the tenements aforesaid, with the appurtenances in their demesne, as of fee and right, in the time of *Charles* the Second, late King of *England*, by taking the esplees thereof, to the value of 10*l.*, and being so seised, on the 18th *June*, in the 24th year of the reign of *Charles* the Second, gave unto *John Molineux*, *Daniel Fleming*, *Richard Eaglesfield*, *Wilfred Lawson*, *Myles Pennington*, and *Andrew Huddleston*, and their heirs, and to the survivor and survivors of them, and his and their heirs, the tenements aforesaid, with the appurtenances, to the use of *Richard Tolson*, and *Anne*, his wife, and their assignee and assignees for their lives, and the life of the longer liver of them, and after the death of the survivor of them, to the use of *Henry Tolson*, and the heirs male of his body, begotten or to be begotten upon the body of *Frances*, his then wife, with divers remainders over, with the ultimate remainder to the use of the right heirs of *Richard Tolson*; by virtue of which gift, and by force of the statute for transferring uses into possession, *Richard Tolson* and *Anne*, his wife, became and were seised of the said tenements, with the appurtenances in their demesne, as of freehold, for the term of their lives, and the life of the longer liver of them, in time of peace, in the time of the said Lord *Charles* the Second, by taking the esplees thereof, to the value of 10*l.*; and being so seised thereof,

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thereof, *Richard Tolson*, on the 2d *July*, 1689, died, leaving the said *Anne*, his wife, him surviving; and the said *Anne*, on the 27th *March*, 1714, died, leaving *Henry Tolson* her surviving, who, thereupon, by virtue of the said gift and by force of the statute, became seised of the said tenements, with the appurtenances in his demesne, as of fee tail, (to wit, to him and the heirs male of his body upon the body of *Frances*, his wife, begotten or to be begotten,) in the time of peace, in the time of the *Lady Anne*, late Queen of *England*, by taking the esplees, &c.; and *Henry Tolson*, on the 27th *September*, 1724, died, leaving *Henry Tolson*, his son and heir male of his body on the body of the said *Frances*, his wife, begotten, him surviving, whereupon the right to the said tenements, with the appurtenances, descended from the first-named *Henry Tolson* to the said *Henry Tolson*, his son, as tenant in tail male, according to the form of the gifts aforesaid, and the last-named *Henry Tolson*, on the 10th *September*, 1729, died, leaving *Henry Tolson*, his eldest son and heir, and *William Tolson*, his second son, him surviving; whereupon the right to the said tenements, with the appurtenances, descended to the last-named *Henry Tolson*, as tenant in tail male, according to the form of the gift aforesaid; and the last-named *Henry Tolson*, on the 2d *February*, 1763, died without issue male of his body lawfully begotten, leaving *Richard Tolson*, son and heir of *William Tolson*, him surviving (the said *William Tolson* having died in the lifetime of the last-named *Henry Tolson*, on the 30th *September*, 1748); whereupon to *Richard Tolson*, as heir male of *Henry Tolson*, his grandfather, after the death of *Henry Tolson*, his uncle, the right to the said tenements, with the appurtenants, descended, as tenant in tail male, according to the form of the gift aforesaid; and the last-named *Richard Tolson*, on the 23d *June*, 1815, died, leaving *Richard*

Henry

Henry Tolson the demandant, his only son and heir of his body lawfully begotten, him surviving; whereupon the right to the said tenements, with the appurtenants, descended to the demandant, according to the form of the gift aforesaid, for that, &c., and therefore he brings his suit, &c. The tenant, after several pleas, upon which issue was joined, pleaded, 25thly, that the supposed title and cause of action, if any, to and for the tenements aforesaid, with the appurtenants above demanded, did not first descend or fall, by force of the supposed gift aforesaid, within twenty years next before the suing out of the demandant's original writ; 26thly, that the supposed title and cause of action, if any, to and for the said tenements, did first descend, more than twenty years before the suing out of the demandant's original writ; 27thly, that the first-named *Henry Tolson* died more than twenty years before the suing out of the demandant's original writ, to wit, on the 27th *September*, 1724, upon whose decease the supposed title and cause of action, if any, to and for the said tenements, by force of the supposed gift, immediately devolved upon and fell to *Henry Tolson*, his son, and that the last-mentioned *Henry Tolson* did not, upon the death of the first-named *Henry Tolson*, ever enter into the tenements aforesaid, with the appurtenants above demanded, by force of the supposed gift aforesaid, after the death of the first-named *Henry Tolson*, and that the supposed title and cause of action, if any, to and for the said tenements aforesaid, with the appurtenants, did not first fall to *Henry Tolson*, the son, by force of the supposed gift aforesaid, upon the death of the first-named *Henry Tolson*, within twenty years next before the suing out of the demandant's original writ.

The 28th, 29th, 30th, 31st, and 32d pleas were substantially the same, tracing the supposed descent, and denying that the said tenements fell to the several

persons

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persons upon whom the said descent was supposed to be cast within twenty years before the suing out of the demandant's original writ.

The replication to these pleas averred, that the right did descend and fall within the space of twenty years next before the suing out of the demandant's original writ. General demurrer to the replication to the above pleas, and joinder.

Hullock Serjt., for the Defendant. The replication to the 25th, 26th, 27th, 28th, 29th, 30th, 31st, and 32d pleas is ill; and the pleas are a sufficient answer to the action. The words of the 21 *Jac.* 1. *c.* 16. *s.* 1. expressly enjoin, that the action shall be brought within twenty years after the title has first descended or fallen, and exclude for ever the persons who do not enter within that time, and their heirs; but the title of an estate tail *first* descends or falls on the first heir in tail, who, in this case, was the *Henry Tolson* whose title accrued in 1724. If each succeeding heir was to be allowed the twenty years, instead of that period being limited to the heir on whom the title *first* descended, the whole object of the statute would be defeated, and claimants might start up against a possession of 500 years' duration. *Cotterel* v. *Dutton* (*a*) is in point; but the decisions on the statute of fines (*b*), *Stowel* v. *Zouch* (*c*), *Doe* v. *Jones* (*d*), bear closely on the question, and are in favour of the Defendant, as is *Doe* v. *Jesson.* (*e*)

Vaughan Serjt., for the demandant. The question, which has never been expressly decided, is, whether, under circumstances such as the present, the demandant's title has not descended to him within twenty

(*a*) 4 *Taunt.* 826.
(*b*) 4 *H.* 7. *c.* 24.
(*c*) *Plowden*, 353.
(*d*) 4 *T. R.* 300.
(*e*) 6 *East*, 80.

years.

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years. As issue in tail, taking *per formam doni*, he has a new and substantive estate. In so far as he must be of the blood of the donee in tail, it is true he takes by descent, but in so far as he takes nothing from his ancestor, but claims *per formam doni*, he may be esteemed in some sort a purchaser. This statute of limitations being in abridgment of common right, must be construed strictly; as, from *Penyston* v. *Lyster* (*a*), it appears that the preceding statute of 32 *H.* 8. *c.* 2. was construed. *Bacon's Abridgment*, tit. *Limitation of Real Actions*, is to the same effect, and a case in *Brooks' Readings.* (*b*) It is true, that, according to this argument, an heir in tail might sue at any distance of time, but this result follows from the nature of his estate being so different from the nature of heirship in fee. He has a new estate, so distinct, that if a tenant in tail agree to sell his estate, and receive the purchase-money, under an undertaking to suffer a recovery, and then die, the Courts will not compel the heir in tail to complete the recovery. *Machell* v. *Clarke* (*c*), *Hinton* v. *Hinton.* (*d*) Then, the word "heirs" is not found in the second clause of the first section of the statute of *James*, from whence it may be presumed, that the statute did not intend to bar them. In *Stowell* v. *Zouch* the statute began to run in the time of the party claiming, and in *Cottcrel* v. *Dutton* it is found as a fact, that the tenant in tail did not bring his formedon till fourteen years after he came of age, though more than twenty years had previously elapsed after the first descent of the title. The decisions on the statute of fines are not inconsistent with the doctrine now contended for, as that statute expressly includes privies within its operation.

(*a*) *Cro. Eliz.* 896.
(*b*) P. 133.
(*c*) 2 *Ld. Raym.* 778.
(*d*) 2 *Ves. sen.* 632.

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Hullock, in reply. If a tenancy in tail can in any way be deemed an estate by purchase, the rule in *Shelley's* case falls to the ground. The heir in tail is not compelled to complete a sale begun by his ancestor, because that would operate as a new mode of barring estates tail. The statutes of limitations have always received a liberal construction, and the argument derived from the 32 *H.* 8. does not apply; the statute of *James* having passed, because the preceding statute was found insufficient for quieting possession. The statute of fines is couched in nearly the same words as the statute of *James*, but the statute of *James* is the stronger, by the introduction of the word *first*. In *Murray* v. *East India Company* (a), *Abbott* C. J. says, "The several statutes of limitation, being all in *pari materiâ*, ought to receive a uniform construction, notwithstanding any slight variations of phrase, the object and intention being the same."

DALLAS C. J. I am of opinion, in this case, that the statute begins to run from the time the title or cause of action first falls or accrues; and I am of this opinion, on the words of the statute, on the construction of them, on the reason of the thing; and, if it be necessary, on the authority of decided cases, and of one in particular which was heard in this court.

I cannot agree in the position that statutes of this description ought to receive a strict construction, on the contrary, I think they ought to receive a beneficial construction, with a view to the mischief intended to be remedied, and this is pointed out by the very first words of the statute, which are, "For quieting of men's estates and avoiding of suits." It is, therefore, that this statute, and all others of this description, are termed by

(a) 5 *B.* & *A.* 215.

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Lord *Kenyon*, statutes of repose, and long before and since the passing of this statute, this has been the principle which has guided the courts in the construction of them. First then, the words of the statute are, "all writs of formedon shall be sued and taken within twenty years next after the title and cause of action first descended or fallen, and at no time after the said twenty years." And, when did the title in this case first descend or fall? It descended first on that tenant in tail, who suffered twenty years to elapse without taking any steps to assert his right. Are then his heirs barred by his neglect? For this it is only necessary to refer to the subsequent words of the statute, "that no person or persons shall at any time herafter make any entry into any lands, tenements, or hereditaments, but within 20 years next after his or their right or title which shall hereafter first descend or accrue to the same, and in default thereof, such persons so not entering, and *their heirs*, shall be utterly excluded and disabled from such entry after to be made." On the construction of this statute, the object of which is to quiet estates, is it falling in with the object of the statute, (when it draws a line as to the party who shall claim) to say that after 140 years, or at any distance of time, it shall be competent for the issue in tail to set up a claim of this description? If so, instead of being a statute "for quieting of men's estates," it would produce the contrary effect, and unsettle all the titles in the kingdom. Therefore, construing the statute reasonably, and with reference to its object, it is clear the writ must be sued out within 20 years after the title first descends, and that has not been done in the present instance. As to cases, I refer to *Doe dem. George* v. *Jesson* (*a*) for the language of Lord *Ellenborough*. "The time allowed by the statute

(*a*) 6 *East*, 83.

for

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for making an entry might be indefinitely extended, if the construction contended for by the Plaintiff were to be admitted. There is no calculating how far it might be carried by parents and children dying under age, or continuing under other disabilities in succession." And then applying himself to statutes of this description, he says, "The statute meant, that the heir of every person, to which person a right of entry had accrued during any of the disabilities there stated, should have ten years from the death of his ancestor to whom the right *first* accrued during the period of disability, and who died under such disability." That language was afterwards adopted by the rest of the Court. But, it is said, that there is a distinction between the heir of one seised in fee, and the heir of a donee in tail, because the former takes clearly by descent, the latter *per formam doni*. That distinction was taken in *Cotterel* v. *Dutton*, but it was repudiated by *Heath* and *Chambre* Js., and the case is an authority in point to shew, that the statute runs from the time when the title first descends or falls. On this ground, therefore, judgment must be given for the Defendant.

PARK J. It has been the endeavour of the jurisprudence of all civilized countries, to give repose to the possession of property, and the question is, whether we shall not give the best effect to this statute, by holding that the time specified begins to run from the period when the title first descends or falls. It has been urged, that the Plaintiff's case is entitled to the indulgent consideration of the Court, but I think the indulgence ought to incline the other way; for, unless the limit pointed out by the statute be observed, no man is safe, but may be reduced to poverty after long and undisputed possession. I agree in the observations made by my Lord on the statute of *James*, and that the

preamble

preamble of the statute settles this question: how should we quiet men's estates if we acceded to the arguments advanced on the part of the Defendant? *Cotterell* v. *Dutton*, if not exactly in point, is as nearly so as can be, and, if any argument could arise on the course of courts of equity, *Mansfield* C. J., who was conversant with those courts, was capable of giving it its due weight; he also puts the similarity between the cases on the statute of *James*, and the cases on the statute of fines. As to the arguments on the construction of the 32 *Hen.* 8., it is clear the statute of *James* passed, because the former had been found insufficient for its purpose. Under all the circumstances of this case, I think the judgment must be for the Defendant.

BURROUGH J. The statute of limitations was intended to quiet possessions, and particularly as to landed property; and we are to carry into effect the object of the statute; now, if men were permitted to lie by till deeds and evidences were lost, no one could be safe, and they might lie by to any length of time, if they could exceed the time prescribed by the statute. The only question we have to decide here is, whether the replications to the seven last pleas are good, and I think that all which do not allege a seisin in the demandant within 20 years, are bad. There is no such allegation here. It is clear, that in the formedon it is not necessary to allege a seisin in the donees, because it is sufficient if a declaration be certain to a certain intent in general, but in the after pleading there must be a higher degree of certainty, especially when the very point which would confer a title is denied. It is clear, that by the demurrer, it must be taken for granted, that the demandant was not seised within 20 years; if so, when did the title first descend? immediately on the death of *Henry Tolson*, and the formedon should have been brought within 20 years after that event. The formedon being a

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proceeding under the statute *West.* 2., if one tenant in tail discontinues, his heirs are put to a mere right and cannot bring their formedon. *Hunt* v. *Burn* (*a*). There is a strong analogy between the cases on the statute of fines, and on this statute; but I object to *Brooks'* readings as authority. They were no more than lectures, and the case cited from them has no bearing on the subject, because the action was wrong, and the Plaintiff, therefore, out of court.

Richardson J. The question on this record is, whether the 20 years under the statute of *James* begin to run when the title descends to the first heir in tail, or whether each succeeding tenant has a right to sue during 20 years after the decease of his predecessor. In my opinion, the words of the statute are a sufficient answer to the present demandant. The first section of the statute is divided into four clauses: the first clause relates to proceedings or rights in existence at the time of the passing of the statute; the second, to such as should arise afterwards. The first clause enacts, that "all writs of formedon in descender, formedon in remainder, and formedon in reverter, at any time hereafter to be sued or brought of, or for any manors, lands, tenements or hereditaments, whereunto any person or persons now hath or have any title, or cause to have or pursue any such writ, shall be sued and taken within 20 years next after the end of this present session of parliament. And after the said 20 years expired, no such person or persons, or any of their heirs, shall have or maintain any such writ of, or for any of the said manors, lands, tenements or hereditaments;" if they do not enter within the time prescribed by the statute, what is the consequence? "that such persons, so not entering, shall be utterly excluded and disabled from such entry after to be made." Upon this branch

(*a*) 2 *Salk.* 422. 1 *Lutw.* 779.

of

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of the first section, it is clear on the words of the statute, that if a person who was entitled at the passing of the statute, did not sue within 20 years, he and his heirs were barred. But it is urged, that in the second clause, the word *heirs* is not found; — true; but it would be extraordinary if we should put a construction on that clause different from the construction on the first. The second clause runs thus, "and that all writs of formedon in descender, formedon in remainder, and formedon in reverter, of any manors, lands, tenements, or other hereditaments whatsoever, at any time hereafter to be sued or brought by occasion, or means of any title or cause hereafter happening, shall be sued and taken within 20 years next after the title and cause of action first descended or fallen, and at no time after the said 20 years." What is the meaning of the words "next after the title, and cause of action *first* descended or fallen?" We must put on the words of this clause, a construction consistent with the words of the first, and whether for a cause of action arising before or after the passing of the statute, persons not suing in time, and their *heirs*, are barred. The decisions on this statute are not numerous, but *Cotterell* v. *Dutton* is in point, and the distinction between the heir of tenant in fee, and the heir of tenant in tail, was urged in that case as it has been in the present, but was overruled, and *Heath* J. stated that no such difference existed. That learned Judge put the same construction on this statute as I am bound to do; and according to that construction, it appears that this title is stale. I think it unnecessary to advert to the statute of fines, but if I were to do so, I should think it right to put the same construction on all the statutes of limitation pursuant to the dictum of *Abbott* C. J. in *Murray* v. *East India Company*.

END OF HILARY TERM.

1819.

Rex *v.* Webb. (*a*)

THE prisoner was tried before *Best* J., at the last *Wiltshire* assizes.

The indictment charged him with feloniously forging and counterfeiting a certain bill of exchange as follows:

154*l.* 9*s.* 0*d.*

Wilton, *Wilts*, *Dec.* 21st, 1818.

Two months after date, pay to my order one hundred and fifty-four pounds nine shillings, for value received and balance of account.

John Webb.

To Mr. *Thos. Bowden*,
Baize Manufacturer,
Romford, *Essex*.

Accepted, *Thos. Bowden.*
Payable when due at
No. 40, *Castle-Street*,
Holborn, *London*.

With intention to defraud *Wadham Lock*, *William Hughes*, and *Henry Saunders*, against the statute, &c. The second count was for feloniously uttering and publishing the same as true, with the like intention. The third count was for forging an acceptance (setting out the acceptance as above) with the like intention. And the fourth count was for uttering and publishing the said acceptance with the like intention.

It was proved on the part of the prosecution that no *Thomas Bowden* (the person appearing on the

(*a*) *Cam. Scacch. Nov.* 13. 1819. The Reporters are indebted to one of their Lordships, who was present, for the statement of this case, and the decision thereon.

the bill to be the acceptor) lived at No. 40, *Castle-Street, Holborn;* and that no such person ever resided or carried on business, or was ever heard of at *Romford*, in *Essex;* and that there is no baize manufactory in *Romford.*

On the part of the prisoner it was proved by a witness, who stated himself to have been a partner in business with *Thomas Bowden* (the acceptor), that the acceptance was the hand-writing of *Thomas Bowden.* This witness, on his cross-examination, said, that *Bowden* never carried on the business of a baize manufacturer at *Romford*, and that the prisoner had known *Bowden* many years. Another witness said he knew *Bowden*, and that the acceptance was his hand-writing. This second witness said, that he kept the house No. 40, *Castle-Street, Holborn*, (the place where the bill is made payable), and that he was surprised at *Bowden*'s accepting the bill payable at No. 40, *Castle-Street, Holborn*, as he did not reside there, and had no authority from this witness to make any bills payable at that house.

Best J. desired the jury, first, to consider whether there was any such person as *Thomas Bowden*, and if there was, whether the acceptance was his. The learned Judge told them, if there was no such person, or the acceptance was not his, and the prisoner, at the time he offered the bill to the prosecutors, knew, either that there was no such person, or, if there was, that he had not accepted it, they should find him guilty: and further directed the jury, if they thought the acceptance was *Bowden*'s writing, to find whether he ever lived at *Romford*, or carried on the business of a baize manufacturer there; and told them that, if they thought *Bowden* never lived at *Romford*, or carried on any manufactory there, and that the prisoner, who appeared from the evidence to be acquainted with him,

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knew that, on addressing the bill to *Bowden*, as baize manufacturer at *Romford*, he was giving him a false description, for the fraudulent purpose of giving credit to the bill, they should find him guilty; and that the Judge would submit the propriety of the conviction under these circumstances to the Judges. The jury found, that there was no such person as *Thomas Bowden*. *Best* J. thought that there was such a person, and that the acceptance was his hand-writing, and wished, therefore, for the opinion of the Judges, whether, assuming that the acceptance was the hand-writing of *Bowden*, the prisoner, by the giving, on the face of the bill, *Bowden* a false description, and uttering the bill after it was accepted by *Bowden* with this false description, with intent to defraud, brought himself within any of the counts of the indictment against him.

Eleven of the Judges (*Best* J. being at Chambers) were of opinion that this case did not fall within the decision of *Parkes* and *Brown*'s case, 2 *East*, *P. C.* 963. S. C. 2 *Leach*, 775.; but that, though a gross fraud, it was no forgery.

CASES

ARGUED AND DETERMINED

IN THE

Court of COMMON PLEAS,

AND

OTHER COURTS,

IN

Easter Term,

In the Third Year of the Reign of GEORGE IV.

1822.

MEMORANDA.

In the last vacation *Robert Henry Blosset* Esq., Serjeant at Law, was appointed Chief Justice of the Supreme Court of Judicature in *Bengal*, and received the honour of knighthood. And

Willingham Franklin Esq., Barrister at Law, was appointed one of the Judges of the Supreme Court of Judicature at *Madras*, and received the same honour.

1822.

April 29.

Sells *v.* Hoare.

On an application for a new trial, it appeared that a witness, who gave himself a false name at the trial, and was sworn on the gospels, was, at that time, a Jew: Held, that the objection came too late, and that the oath, as taken, subjected the witness to the consequences of perjury, if he had sworn falsely.

VAUGHAN Serjt., for the Defendant, moved for a new trial in this cause, on the ground, among others, that a person calling himself *Joseph Manning*, had been duly sworn on the Gospels as a Christian: whereas it had been discovered since the trial, that his real name was *Solomon Money*, that he was a Jew before and at the time of the trial, and that he was still a regular attendant at the synagogue. The learned Serjt. urged, that the jury, in coming to the conclusion which they had done, must have believed the testimony of this witness, who had given his evidence under a sanction which he could not, from his religion, consider binding.

But the Court held, that the objection came too late (*a*), and that it would be productive of great danger and confusion if such affidavits were received. They were unanimously of opinion, that the oath, as taken, was binding on the witness both as a moral and religious obligation; and *Richardson* J. observed, that, if the witness had sworn falsely, he would be subject to the penalties of perjury, if indicted, and convicted of that offence, under the oath which he had taken.

(*a*) See *Phillipps's Evidence*, vol. 1. p. 24. edit. 5., and the authorities there collected.

1822.

April 29.

RICHARD ANGEL NOBES v. MOUNTAIN and Others.

A bankrupt refusing to be sworn before the commissioners, on the ground that his legal adviser had not arrived: Held, that their warrant for his commitment, stating generally that he refused to be sworn, was sufficient, without adding the reason assigned by the bankrupt for his refusal.

Held, also, that the warrant committing him "until such time as he shall submit himself to us, or the major part of the said commissioners by the said commission named and authorised, and take the oath prescribed by law for that purpose, and full answer make to our or their satisfaction to the questions which may be put to him by virtue of the said commission," was sufficient; and that by "the questions which may be put to him by virtue of the said comissioners," must be implied legal questions.

TRESPASS against the Defendants, commissioners of bankrupt, for false imprisonment. At the trial, before *Burrough J.*, *Salisbury* Lent assizes, 1822, the Defendants justified under their warrant, which was made out in consequence of the Plaintiff's refusing to be sworn till his attorney arrived, though some delay was first granted in the expectation of such arrival. The warrant, signed and sealed by the Defendants, (after reciting the commission; that the commissioners having begun to execute the commission, had, on examination of witnesses, found the Plaintiff a bankrupt; that notice was given in the *Gazette* for the Plaintiff to surrender himself on certain days then past, and at a place in the warrant named, and that the Plaintiff did not surrender himself; in consequence whereof the Plaintiff was duly summoned, as had been represented to the commissioners, in pursuance of their summons for that purpose, to appear before them, the major part of the commissioners in the said commission named, on the 26th *March* last, at the *White Hart*, *Cricklade*, then and there to be examined, and make a full disclosure and discovery of his estate and effects; and that the Plaintiff did not surrender himself to the major part of the said commissioners, who had signed a certificate thereof, proceeded as follows: "And whereas the said *Richard Angel Nobes* having been committed to his majesty's gaol of *Newgate* (a), and being this day brought before us, the major

(a) Under a judge's warrant, granted on the certificate of the Defendants, for not appearing to their summons.

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MOUNTAIN.

major part of the commissioners in the said commission named and authorized, by our messenger, in pursuance of our warrant for that purpose, to make a full discovery and disclosure of his estate and effects, was then and there duly called upon to take the oath usually administered to bankrupts, in order to our requiring him to make such disclosure and discovery of his estate and effects as aforesaid; but the said *Richard Angel Nobes*, in contempt of our authority and in disobedience to the said commission, absolutely refused to take such oath; These are, therefore, to will, require, and authorize you, immediately upon the receipt hereof, to take into your custody the body of the said *Richard Angel Nobes*, and him safely convey to his majesty's prison in and for the said county of *Wilts*, and him there to deliver to the keeper of the said prison, who is hereby required and authorized, by virtue of the commission and statutes aforesaid, to receive the said *Richard Angel Nobes* into his custody, and him safely keep and detain, without bail or mainprize, *until such time as he shall submit himself to us, or the major part of the said commissioners by the said commission named and authorized, and take the oath prescribed by law for that purpose, and full answer make, to our or their satisfaction, to the questions which may be put to him by virtue of the said commission*; and for so doing this shall be your sufficient warrant. Given under our hands and seals at *Cricklade*, in the county of *Wilts*, this 10th day of *May*, in the year of our Lord 1821. A verdict having been found for the Defendants,

Pell Serjt. now moved for a new trial, on the ground that the power vested in commissioners of bankrupt being unknown to the common law, and such as ought to be strictly pursued and watched, the plaintiff ought to have been remanded under the judge's warrant, or that the commissioners' warrant ought to have stated

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stated the excuse offered by the plaintiff, when he refused to be sworn, and to have committed him only till he should answer all *lawful* questions; that being the expression used in the statute (*a*): he insisted, that the latter objection, though technical only, ought to avail in such a cause; and he cited *Nathan*'s case (*b*), *Bracy*'s case (*c*), *Hollingshead*'s case (*d*), and *Miller*'s case (*e*), relying on the report of it in *Blackstone*, as to the opinion of the Court on the objection to the concluding words of the warrant in that case. And he endeavoured to distinguish the present case from *Ex parte Page*. (*f*)

DALLAS C. J. In a case of this description, it would be no answer to an objection to urge that it was merely technical; because it is often the duty of counsel to take such objections in favour of the liberty of the subject; but, when taken, they can only receive a reasonable construction. What are the facts of this case? The Plaintiff was taken before the commissioners to be examined, and, if he wished to postpone his examination till the arrival of his professional adviser, his course of proceeding was obvious; he should have submitted to be sworn at once, and then have requested to be remanded till such time as he might deem convenient. But unless he submitted, I do not see how the commissioners could take his statement of a single fact; every allegation so made must have been irregular. It must, therefore, be borne in mind, that the Plaintiff was not committed for refusing to answer questions, but for refusing to be examined altogether. If he had been committed for refusing to answer any particular question, such question ought certainly to have appeared on the

(*a*) 5 *Geo.* 2. *c.* 30. *s.* 16.
(*b*) 2 *Str.* 880.
(*c*) 1 *Ld. Raym.* 99.
(*d*) 2 *Ld. Raym.* 851.
(*e*) 3 *Wils.* 420. 2 *Bl.* 881. *S. C.*
(*f*) 1 *B. & A.* 568.

warrant;

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warrant; for no man is bound to answer a question illegally put: but this is not a case of that description. The objection, which resolves itself into an objection to the form of the warrant, though merely technical, might have been conclusive if a case had been adduced to support it: but I know of no case determined in express terms on such a ground, nor any which can support it by analogy. We must, therefore, look at the statute, and that, in the sixteenth section, empowers the commissioners to commit the bankrupt till he answer such lawful questions as may be put to him.

Undoubtedly, every question put by a legal tribunal will be intended to be lawful, though the word is often introduced for the sake of caution; but it is afterwards dropped in this same section of the statute, where the language is, "It shall and may be lawful to and for the said commissioners, or the major part of them, by warrant, under their hands and seals, to commit him, her, or them to such prison as the said commissioners, or the major part of them, shall think fit, there to remain without bail or mainprize, until such time as such person or persons shall submit him, her, or themselves to the said commissioners, and full answer make to the satisfaction of the said commissioners *to all such questions* as shall be put to him, her, or them as aforesaid." By the expression "such questions" will be intended legal questions, till the contrary appears; and in case of a commitment for refusal to answer any particular question, the contrary would appear on the face of the warrant, if the question were illegal. But the bankrupt is bound to submit in the first instance; he has failed to do so, before any questions were put; and, I think, this warrant does sufficiently follow the statute, and that the bankrupt was properly committed.

PARK J. No one, who sits here, disputes the general principle, that the commissioners' authority must be pursued

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pursued strictly; but there is no objection to this warrant on the face of it, whether it be considered on the statute or on the constant usage. The confusion has, I think, arisen from its being supposed that the bankrupt was committed for not answering a particular question; whereas, persisting in his refusal to be sworn, he was committed for not submitting at all. The form of the oath is, "You shall true answer make to *all such* questions as shall be put to you," not "to all such *lawful* questions;" for the commissioners cannot put any questions save such as are lawful. The commitment pursues the terms of the oath, and the language of the act: it is in the form which is generally used; and I have no doubt that the commitment is lawful.

BURROUGH J. I am satisfied with the commitment now, as I was at the trial. This is not like a case where a bankrupt is committed for not answering some special question; but it is a case where the bankrupt resists the authority of the commissioners, and refuses to be sworn or to submit to any examination at all, and the commissioners could not act otherwise than as they have done. The bankrupt might have demurred, if an illegal question had been put to him; but the words on the face of the warrant, "the questions which may be put to him by virtue of the said commission," must be intended to mean legal questions.

As to any hardship upon the bankrupt, I can see none in the case. The commissioners waited some time for the arrival of his attorney, and, after his commitment, he might have been brought up whenever he pleased.

RICHARDSON J. The objection relied on for the Plaintiff, is the omission of the word lawful: but I am of opinion that the law does not require that word to be inserted. The sixteenth section of the 5 *Geo.* 2. *c.* 30. does

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does not repeat the word lawful after employing it once, but it is to be implied that the act speaks all along of lawful questions; for no questions save lawful questions can be put; and the same must be implied as to this warrant, which, here, seems to me to correspond with the statute. Nor do the cases come up to this: *Miller's* case is the nearest; but the objection to the conclusion of the warrant there, was, not the omission of the word lawful, but that some of the questions asked were not inserted in the warrant, and the decision was perfectly right. No case, therefore, comes up to this objection, nor do the words of the statute.

Another objection was incidentally taken, and it was said that the bankrupt ought to have been remanded under the judge's warrant; but I think that a mistake. The fourteenth section empowers judges to apprehend and commit the bankrupt, upon the certificate of the commissioners, to gaol, "there to remain until he, she, or they be removed by order of the said commissioners, or the major part of them, by warrant under their hands and seals." It seems to me that the bankrupt could not have been remanded under the judge's warrant; for, when he was brought before the commissioners, the judge's authority was at an end. The commissioners were bound to detain the bankrupt till he submitted to answer: I do not think the commissioners could have acted otherwise; and there is not any weight in the objection that the excuse assigned by him for not answering should have been set forth on the warrant. No excuse could be admitted for a refusal to submit to be sworn. I am of opinion that there is no ground on which this application can be supported.

Rule refused.

1822.

BOOTHBY *v.* MORTON.

April 29.

The surveyor under a drainage statute is entitled to take advantage of a clause limiting the commencement of actions to six months after the act complained of, though it does not appear he has made the compensation directed by the statute for the act complained of, or pursued the course on the observance of which the statute enables him to enter on the lands of others.

TRESPASS against the Defendant as surveyor to the commissioners under the *Witham* drainage act. (*a*) The wrong complained of was the digging of a ditch of unusual width and depth, and throwing the soil, &c. on the land of the Plaintiff, whereby Plaintiff's crop of cole-seed was spoiled, and some of his sheep drowned. The ditch was dug about a year before the commencement of the action. The sheep were drowned, and the crop of cole-seed was spoiled, within six months of such commencement. At the last *Lincoln* assizes, *Best* J., before whom the action was tried, was of opinion that the action ought to have been brought within six months from the digging of the ditch, and directed a nonsuit; but gave leave to move to set it aside. Accordingly,

Vaughan Serjt. now moved for a rule *nisi* to that effect, upon the ground that the commissioners could not claim the benefit of the clause, (which directs that all actions against the commissioners shall be brought within six months, and not afterwards,) unless it appeared that they had offered the compensation, or taken the other steps directed by the 91st section (*b*) of the act,

(*a*) 2 *Geo.* 3. *c.* 32.

(*b*) By the 91st section the commissioners are empowered to purchase lands, &c. and where persons shall refuse or neglect to treat, the commissioners are empowered to issue their warrant to the sheriff to impanel a jury, which "shall enquire of, assess, and ascertain, the sum or sums of money to be paid, for the purchase of such lands, tenements, or hereditaments, or the recompense to be made for damages that may or shall be sustained as aforesaid, and to settle and ascertain in what proportions the sum or sums so assessed shall be paid to the

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act, which, he contended, must be deemed conditions precedent to the claiming any protection under the act, since it appeared by the 94th section (*a*), that the commissioners' right of entry arose only on their pursuing the course there pointed out; in the same manner as by the usual provisions of turnpike acts, the digging of gravel is only allowed where a proper compensation has been offered.

But the Court refused the rule, observing, that the act contained nothing which afforded any ground for supposing that, even if the provisions pressed on their notice had not been complied with, the action against the commissioners could, therefore, be brought at any unlimited time; and

Vaughan took nothing by his motion.

the several persons interested in the premises; and the said respective commissioners, or any five or more of them, shall give judgment for such purchase-monies or recompense so to be assessed by such juries; which said verdict, and the judgment thereupon pronounced by the said respective commissioners, or any five or more of them, shall be binding and conclusive, to all intents and purposes, against all parties."

(*a*) By the 94th section, it is enacted, "That upon payment of such sum or sums of money as shall be agreed upon between the said respective commissioners, or any five or more of them, and the party or parties interested, or of such sum or sums of money as shall be assessed by any such jury to such party or parties, or legal tender thereof made, or to the principal officer or officers of any such bodies politic, corporate, or collegiate; or if he, she, or they cannot be found, or shall refuse to accept such money, upon payment thereof to such person or persons as the said respective commissioners, or any five or more of them, shall, by writing under their hands, appoint for the use of, and to be paid upon demand, without fee or reward, to such party or parties respectively, the said respective commissioners, and all persons employed or authorized by them, or any five or more of them, shall have full power and authority to enter upon the lands, tenements, or hereditaments, in respect whereof such monies were so agreed for or assessed, and to make use of such lands, tenements, and hereditaments, for the purposes of this act; and they shall be, and are hereby indemnified for so doing."

1822.

FORD v. WEBB.

April 30.

DEBT on stat. 2 *Geo.* 2. *c.* 23., intituled " an act for the better regulation of attornies and solicitors." The sixth count of the declaration (on which alone the case turned,) stated, that " the Defendant within 12 months before action brought, did unlawfully, in his own name, act as a solicitor for and on the behalf of certain persons, *viz. Isaac Howell, Charles Hare*, and *Edward Jones*, in his Majesty's Court of Chancery, (the said court then being held at *Westminster*, &c. and then and there being a court in which solicitors had been accustomably admitted and sworn,) in the carrying on of certain proceedings in the said court, *viz.* proceedings in the matter of one *Thomas Smith*, a bankrupt, for and in expectation of gain, fee, and reward, the defendant not then being, nor having been admitted and enrolled a solicitor of the said court, or an attorney or solicitor of any one of the courts of law or equity mentioned in a certain act, &c. intituled, &c." Plea, general issue. At the trial before *Dallas* C. J., at the *Westminster* sittings after *Michaelmas* term last, it appeared that the creditors of the bankrupt conceiving that the costs of the commission against *Smith* had been overcharged, applied to the defendant, who was not an attorney, but a certificated conveyancer, to get the bill taxed, and one of them stated that he gave the defendant directions to that effect; the action was brought against the defendant for acting as solicitor in the matter of a petition to the Lord Chancellor

Debt on stat. 2 *Geo.* 2. *c.* 23. for acting as a solicitor in the Court of Chancery, (*viz.* in the matter of *T. S.*, a bankrupt,) the Defendant not being a solicitor of the said court: — the Plaintiff, having proved that the Defendant (not a solicitor of the court) had been consulted, and had been instrumental in the matter of a petition to the Lord Chancellor, by the creditors of *T. S.* (which petition bore the name of certain admitted solicitors, and was intituled " In bankruptcy,") praying for the taxation of the bill of the solicitor to the commission, was nonsuited, and the Court refused to set the nonsuit aside: *Semble*, that proceedings in bankruptcy are not proceedings in Chancery.

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cellor to have the bill taxed. The petition, intituled "In Bankruptcy," was in the name of certain admitted and enrolled solicitors, and sent by them to the defendant in the country, in whose presence it was signed by the parties concerned. *Dallas* C. J. was of opinion, that the action could not be maintained, and the plaintiff was non-suited, with leave to move to set the nonsuit aside and have a new trial. Accordingly,

Lens Serjt. in the last term obtained a rule *nisi* to that effect. And now

Bosanquet Serjt., who shewed cause against the rule, mainly relied on the circumstance, that this proceeding was not in Chancery, that the petition was intituled "In Bankruptcy," not "In Chancery," and that if it had been intituled "In Chancery," the Chancellor could not have heard it. *Ex parte Lund.* (*a*)

Lens, in support of the rule, contended, that by proceedings in Chancery were to be understood all such proceedings as came into the Court of Chancery; such as cases of lunacy and bankruptcy; otherwise much business done in the Court would be out of the reach of the act: that the Lord Chancellor, therefore, when sitting in bankruptcy, was sitting in Chancery; and he cited the words of *Mansfield* C. J. in *Collins* v. *Nicholson* (*b*), "It is now decided, that all proceedings by petition to the Chancellor are proceedings in Chancery."

The Court concurred in discharging the rule. *Park* J. observed, that the Lord Chancellor sat in bankruptcy under a separate commission; and that

(*a*) 6 *Ves. jun.* 782. (*b*) 2 *Taunt.* 322.

the

the Judges who were empowered to sit for the Lord Chancellor, as keeper of the great seal, could not sit in bankruptcy. *Richardson* J. added, that the declaration, which alleged that the defendant had acted as a solicitor in the carrying on of certain proceedings in the Court of Chancery, had not been borne out.

1822. FORD v. WEBB.

Rule discharged. (a)

(a) See stat. 53 *Geo.* 3. *c.* 24. *s.* 1, 2, and 3.

LANGLEY v. SNEYD and Others.

May 8.

THIS case came before the Court by the direction of his Honour the Vice Chancellor, and arose under the following circumstances.

A. on the marriage of his daughter *C.*, conveyed property to the use of himself for life; remainder to the use of *B.*, his daughter's intended husband, for life; remainder to the use of *C.* for life; remainder to the use of the sons of the marriage successively in tail; remainder to the use of the daughters of the marriage as tenants in common in tail; reversion to the use of *A.* *A.* afterwards, on his death, devised all his property, not before settled, to the use of his widow for life; remainder to the use of *B.* for life; remainder to the use of *C.* for life; remainder to the use of their sons successively in tail, (subject to a term for the provision of younger children;) remainder to the use of the daughters as tenants in common in tail; remainder to the use of *C.* and her heirs. *B.* and *C.* afterwards levied a fine of all the before-mentioned premises to the use (subject to the uses in the settlement and will mentioned), of such person as *C.*, by will in writing, or any writing of appointment purporting such will to be by her signed, in the presence of, and attested by three or more witnesses, should appoint; (which will, or writing of appointment in nature of a will, *C.*, notwithstanding her coverture, was thereby empowered to make,) and, in the mean time, and for want of such appointment for the whole or any part, to the use of *C.* and her heirs. *C.* having survived *B.*, by whom she had no issue, married *D.*, whom she also survived, and then died, leaving *E.* an only son by *D.* To this son *C.*, in 1819, by an instrument purporting to be her will, signed in the presence of, and attested by three witnesses, left all her real estate in fee, the instrument containing a provision that the property should go over to *C.*'s sister in case of *E.*'s dying in *C.*'s lifetime. *E.* shortly afterwards died a minor, intestate and without issue: Held, 1. that the instrument executed by *C.* in 1819, did not, as to the estates comprised in the fine, operate as an execution of *C.*'s power of appointment, but as a devise by her by force of her interest. 2. That *E.* took by descent from his mother, and not by purchase.

 Inden-

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Indentures of lease and release, and settlement, bearing date, *February* 1777, were executed by and between *William Bowyer* of the first part; *Thomas Ley* and *John Goodwin* of the second part; *Moreton Walhouse* and *Arthur Bowyer*, brother of the said *William Bowyer*, of the third part; *Edward Walhouse Okeover*, only child and heir apparent of the said *Moreton Walhouse*, of the fourth part; and *Margaret Bowyer*, daughter and only child and heiress apparent of the said *William Bowyer*, of the fifth part; whereby (after reciting that a marriage was intended then shortly to be solemnized between the said *Edward Walhouse Okeover*, and *Margaret Bowyer*, by the mutual consent of their respective fathers, and further reciting a settlement made by *Moreton Walhouse*, in prospect of the marriage, and providing for younger children,) *William Bowyer* (in consideration of the intended marriage, and of the settlement and conveyance so made by *Moreton Walhouse*, and for settling and conveying the manor, &c. thereinafter mentioned to such uses, &c, as are thereinafter mentioned, and for making a provision for the said *Margaret Bowyer* and the issue of the said marriage,) did grant, &c. to *Thomas Ley* and *John Goodwin*, their heirs and assigns, the manor, &c. therein particularly mentioned, to hold the same unto *Thomas Ley* and *John Goodwin*, their heirs and assigns, to the uses thereinafter mentioned, to take effect from the solemnization of the said intended marriage, *viz.* to the use of *William Bowyer* and his assigns during his life, without impeachment of waste; remainder to the use of *Thomas Ley* and *John Goodwin*, and their heirs during his life, in trust to support contingent uses and estates; remainder to the use of *Edward Walhouse Okeover* and his assigns for the term of his life, without impeachment of waste; remainder to the use of the said trustees and their heirs during his life, to support contingent remainders; remainder to the use of *Mar-*

garet

garet Bowyer, his then intended wife, and her assigns during her life, without impeachment of waste; remainder to the use of the same trustees and their heirs during her life, to support contingent remainders; remainder to the use of *Moreton Walhouse* and *Arthur Bowyer*, their executors, administrators, and assigns, for the term of 500 years, without impeachment of waste, upon certain trusts therein mentioned, for the raising portions and maintenance for daughters and younger sons; remainder to the use of the first and other sons of *Edward Walhouse Okeover*, on the body of *Margaret*, his intended wife, to be begotten, and of the heirs of their respective bodies successively; remainder to the use of the daughters of *Edward Walhouse Okeover*, on the body of the said *Margaret* to be begotten, equally as tenants in common, and of the heirs of their respective bodies, with remainder or reversion to the use of *William Bowyer* for ever.

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Soon after the execution of these indentures of *February* 1777, the marriage was solemnized between *Edward Walhouse Okeover* and *Margaret Bowyer*.

Afterwards, *William Bowyer* duly made and published his last will and testament in writing, dated *September* 1780, whereby (amongst other things) he devised to *Thomas Ley* and *Arthur Bowyer*, their heirs and assigns, all and every his real estates whatsoever not settled on his daughter's marriage with *Edward Walhouse Okeover*, except certain estates therein mentioned, subject to the payment of such part of his debts as the estates so excepted should fall short of paying, to the use of his wife, *Christiana Bowyer*, for the term of her life, without impeachment of waste in lieu of dower; remainder to the use of his son-in-law, *Edward Walhouse Okeover*, for his life, without impeachment of waste; remainder to the use of the same trustees, and their heirs during his life, in trust to support contingent uses; remainder to

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the use of his daughter *Margaret Okeover*, wife of *Edward Walhouse Okeover*, for her life without impeachment of waste; remainder to the use of the same trustees and their heirs during her life, in trust to support contingent uses, and from and immediately after her decease, (subject to and charged, and chargeable with the sum of 7500*l*., payable to the daughter, younger sons, or younger son of *Edward Walhouse Okeover*, by *Margaret* his wife,) to the use of the first and other sons of *Edward Walhouse Okeover*, on the body of *Margaret* his wife, and the heirs of their bodies respectively, successively; remainder to the use of the daughters of *Edward Walhouse Okeover*, on the body of *Margaret* his wife, equally, and the heirs of their respective bodies as tenants in common, with remainder to the use of his daughter, *Margaret Okeover*, her heirs and assigns for ever.

William Bowyer died in the same year without having revoked or altered his said will.

An indenture, dated the 14th *October*, 1786, was made and executed by and between *Edward Walhouse Okeover* and *Margaret* his wife, of the one part, and *John Sneyd*, of the other part, whereby (after reciting the indentures of lease and release and settlement of *February* 1777, and the said marriage and will of *William Bowyer*, and the death of *William Bowyer*, and that *Christiana Bowyer* was then living, and that *Edward Walhouse Okeover* had not any issue by *Margaret* his wife; and also reciting, that *Edward Walhouse Okeover* and *Margaret* his wife, had consented and agreed, that the reversion and remainder in fee simple expectant, on the determination of the estates for life of *Edward Walhouse Okeover* and *Margaret* his wife, and, in default of issue of their bodies, of and in the manor, and the several other hereditaments and premises comprised in the therein mentioned indenture of release and settlement,

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ment, and whereof *Margaret Okeover* was then seised, by virtue of or under the limitations contained in the same indenture, and also the reversion or remainder in fee simple, expectant on the determination of the several estates for life of *Christiana Bowyer* and *Edward Walhouse Okeover*, and *Margaret* his wife; and in default of issue of the body of *Edward Walhouse Okeover*, by *Margaret* his wife, and whereof *Margaret Okeover* was then seised or entitled to by virtue of or under the will of her late father, should be respectively limited, settled, and assured, in such manner and subject to such power of appointment by *Margaret Okeover* as thereinafter mentioned; for which purpose they the said *Edward Walhouse Okeover* and *Margaret* his wife, had agreed to levy such fine as thereinafter mentioned:) *Edward Walhouse Okeover*, for himself and for *Margaret* his wife, their heirs, executors, and administrators, covenanted with *John Sneyd*, his heirs and assigns, that they the said *Edward Walhouse Okeover* and *Margaret* his wife, would levy a fine to *John Sneyd*, and his heirs, of the said manor, &c., in the said indentures of lease and release and will mentioned; first, to confirm the several uses, &c. in the said recited indenture of release and settlement and will, respectively limited, antecedent to the remainder or reversion in fee thereof, respectively limited to the right heirs of *William Bowyer*, deceased, and to the use of *Margaret Okeover*, her heirs and assigns for ever; and subject to the said several uses, &c. and as the same should respectively end and determine, to the use of such person and persons, and for such estate and estates, and in such parts, shares, and proportions, and for such intents and purposes, and subject to such provisoes, restrictions, and limitations, as *Margaret Okeover*, from time to time, during her life, by her last will and testament in writing, or any writing of appointment, purporting such will to be by her signed and published

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in the presence of and attested by three or more credible witnesses, (and which will, or writing of appointment in nature of a will, *Margaret Okeover*, notwithstanding her coverture, was thereby empowered to make) should direct or appoint, of or concerning the said premises, or of or concerning any part thereof; and as well for want of such direction or appointment, as in the mean time and until such direction or appointment should be made or given, and likewise subject to any such direction or appointment as should be so at any time made or given, where the same should not be a complete and absolute direction or appointment of the whole of the said premises, or of the whole estate or interest therein, and as and when any estate or interest therein, or in any part thereof should respectively end and determine, to the use of *Margaret Okeover*, her heirs and assigns for ever.

The fine by the said indenture covenanted to be levied, was duly levied in *Michaelmas* term, 1786.

Edward Walhouse Okeover died many years ago, without leaving any issue by *Margaret* his wife, and *Christiana Bowyer* also died many years ago; and, in the year 1797, *Margaret Okeover* intermarried with, and became the wife of, the Reverend *Thomas Langley*, clerk, who died in the year 1808, in the lifetime of *Margaret Langley*, leaving issue by *Margaret Langley* a son, *Thomas Langley*, and a daughter who died an infant in the lifetime of *Margaret Langley*, and before the making of *Margaret Langley's* will, hereafter set forth.

Margaret Langley was, at the time of making her will hereinafter set forth, and from thenceforward down to the time of her death, seised in fee simple, in possession of certain real estates, not comprised in the aforesaid indenture of the 14th *October*, 1786, and the fine levied in pursuance of the covenant therein contained, which she purchased after the death of *Thomas Langley*, her husband; but *Margaret*, at the time of making her will,

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had no estate or interest in remainder, reversion, or expectancy, other than as hereinbefore and hereinafter appears.

Margaret Langley made an instrument in writing, purporting to be her will, dated the 25th *August*, 1819, and which was signed and published by her, in the presence of, and attested by three credible witnesses, and such will was as follows: "This is the last will and testament of me, *Margaret Langley*, of *Snelstone*, in the county of *Derby*, widow, made this 25th day of *August* 1819, in sound and disposing mind, memory, and understanding; first, I will, order, and direct all my just debts, and my funeral and testamentary expenses, to be duly paid, satisfied, and discharged, by my executors hereinafter named; and I give, devise, and bequeath all and every my manors, messuages, farms, lands, tenements, hereditaments, and real estate whatsoever, whether in possession, reversion, remainder, or expectancy, and all and every my household goods and furniture, and implements of household plate, linen, china, farming stock, both quick and dead, ready money, and money out at interest in the hands of other persons, upon mortgage, bonds, notes, or other securities, and all other my personal estate and effects whatsoever and wheresoever, unto my well beloved and only child, *Thomas Langley*, to hold the same unto and to the only proper use and behoof of my said child *Thomas*, his heirs, executors, administrators, and assigns, for ever, subject nevertheless to the payment of the following legacies, which I give and bequeath to the undermentioned persons, to be paid at the expiration of twelve calendar months next after my decease, that is to say (here followed several legacies); provided always nevertheless, and I do hereby declare it to be my will and mind that, in the event of my said son departing

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this life in my lifetime, without leaving lawful issue, all my real and personal estates and effects hereinbefore given, devised, and bequeathed to him, shall (subject to the legacies hereinbefore mentioned) go, and I do hereby give, devise, and bequeath the same unto and to the only proper use and behoof of my dear sister, *Sarah Welch*, of *Five Ways House*, *Warwickshire*, to her sole and separate use, her receipt standing good for receiving the same, and to her heirs for ever, equally to be divided between and amongst them as tenants in common, and not as joint-tenants, and of their several and respective heirs, executors, administrators, and assigns for ever: and whereas I am seised of or entitled to various estates in mortgage, or subject to redemption, on payment of certain principal sums advanced by me, upon security of the same, now I give, devise, and bequeath all and every the messuages, lands, tenements, and hereditaments whatsoever, whereof I am so seised or entitled, by way of mortgage, with their and every of their appurtenances, and all my estate and interest therein, to my friend, *Thomas Alcock*, of *Cheadle*, his heirs, executors, administrators, and assigns, according to the nature of the said several estates, upon trust and to the intent that he the said *Thomas Alcock*, his heirs, executors, administrators, or assigns, do and shall, upon payment unto my executors or administrators, of such sum and sums of money as shall be due and owing upon or in respect of the said several mortgaged premises, convey, assign, and assure the same, with the appurtenances, unto or for the person or persons who, at the time of making such respective payments, shall be entitled to the equity of redemption thereof, and to his, her, and their heirs, executors, administrators, or assigns, according to the nature of the said premises respectively; and I do hereby direct, that the monies which shall be received for or in respect of the said several

veral mortgages, shall go and be paid, and applied in the same manner as my other personal estate hereinbefore given and bequeathed; and, lastly, I do hereby nominate, constitute, and appoint my friends, *Thomas Alcock*, of *Cheadle*, *Staffordshire*, and *James Riddlesden*, surgeon, of *Ashbourne*, executors of this my last will and testament, and guardians of the person and estate of my dear child, *Thomas Langley*, during his minority, hereby revoking and making void all former and other wills by me made, and declaring this only to be and contain my last. In witness whereof, &c."

Margaret Langley died on the 22d of *February*, 1821, at *Montpellier*, in *France*, leaving *Thomas Langley*, her only child and heir at law, who died at *Montpellier*, on the 27th *March*, 1821, an infant of the age of nineteen years, or thereabouts, intestate, unmarried, and without issue, leaving the Reverend *John Langley*, the plaintiff, his uncle and heir at law, *ex parte paternâ*; and *Elizabeth Harrison* and *Sarah Ellen Evans*, two of the Defendants, his co-heiresses at law, *ex parte maternâ*.

Parts of the estates whereof *Margaret Langley* was seised in fee simple in possession, and which she purchased after the death of *Thomas Langley*, her husband as aforesaid, and also parts of the estates comprised in the said indenture of the 14th *October*, 1786, and the said fine, were, at the time of *Margaret Langley* making her will, in lease to various persons for terms of years, and from year to year.

The following questions were submitted for the opinion of the Court.

First. Whether the instrument, dated the 25th *August*, 1819, executed by the said *Margaret Langley*, does, as to the estates comprised in the said indenture of the 14th *October*, 1786, and the said fine, operate at law as an execution of the power of appointment, or as a devise by her by force of her interest.

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Second. If the said instrument operates at law as an execution of the said *Margaret Langley's* power of appointment, did *Thomas Langley*, her son, take by purchase or by descent?

Third. If the said instrument operates at law as a devise by the said *Margaret Langley*, by force of her interest, did *Thomas Langley*, her son, take by purchase or by descent?

Lens Serjt., for the Plaintiff. *Margaret Langley* disposed of her property by virtue of the power of appointment given her in the deed of 1786, and her son took as a purchaser under this disposition; so that the property will descend to his heirs, *ex parte paternâ*. That *Margaret Langley* acted under the power and not with a view to any interest she might have, independently of the power, must be collected from her intentions, and from the situation in which she was placed. Now, by the deed of 1786, it appears she *consented* and agreed to acquire a controul over the property, by means of this power of appointment, which power was then beneficial, as it enabled her to dispose of the property in parts, and during her husband's life; by that deed too, to which she was a party, the remainders over, in default of appointment, are all limited to relations, *ex parte paternâ*. Then, if, as is probable, she wished to confer an obligation on her son, that could only be effected under the power of appointment; for his claim as a mere devisee would be merged in his claim as heir at law. Supposing it, therefore, to have been the intention of *Margaret Langley*, that her son should take under her appointment, it is immaterial whether that appointment was executed by deed or will, and whether the instrument containing the execution of the power, referred to the power in terms or not. Though the instrument be in form testamentary, it is the

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the intention of the party which must decide whether the instrument shall enure as a will or an appointment. *Cox* v. *Chamberlain.* (*a*) The only case which resembles the present, is *Hurst* v. *Earl of Winchelsea* (*b*), but that case has never been acted upon, the lord keeper *Henley's* decree pursuant to the decision of the King's Bench having been afterwards appealed against.

Peake Serjt., for the Defendants. First, *Margaret Langley* has made a will and not an appointment; secondly, whether this be so or not, the act she has done is altogether nugatory, so that her son took by descent, and his heirs *ex parte materná* are entitled to the property. Considering the circumstances in which the testatrix stood, originally deriving the property from her father, and at the time of the disposition in question, being possessed of the ultimate remainder in fee, the instrument is as much entitled to the character of a will, as any testamentary disposition made by a party having absolute dominion over property. The only object of investing her with the power of appointment was, that, though a *feme coverte*, she might dispose of this property as if she had been a *feme sole*; for had she continued single, the power would probably never have been created. The power did not divest any interest she had before, *Penne* v. *Peacock* (*c*), but only enabled her to do more, than as a *feme coverte* she could otherwise have done. Now, where an act is done by one who has an interest as well as a bare power, the act shall always be deemed to have been done in virtue of the interest, and not in virtue of the power, *Clere's* case (*d*) *Cox* v. *Chamberlain*, *Maundrell* v. *Maundrell.* (*e*) *Margaret Langley*, therefore, must

(*a*) 4 *Ves. jun.* 631.
(*b*) 2 *Burr.* 880. 1 *Bl.* 187.
(*c*) *Cas. Temp. Talb.* 41.
(*d*) 6 *Rep.* 17.
(*e*) 10 *Ves.* 246.

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be taken to have acted in virtue of her own interest in the property, and as she had no motive for resorting to the power, the instrument in question must be deemed a will; if so, the act was nugatory, and her heir takes by his higher title of descent. *Clarke* v. *Smith* (*a*), *Allam* v. *Heber* (*b*), *Hedger* v. *Row*. (*c*) But even if the instrument were an execution of the power, the act would be equally nugatory, and the heir would take by descent, because, as it has before been shewn, an act shall never take effect under a power, where it may also take effect under an interest; and *Hurst* v. *Earl of Winchelsea* must still be considered as having been decided on the sound rule of law.

Lens in reply, relied on the supposed intention of *Margaret Langley*, as expressed by the legacies in *partem paternam*, (though he admitted, that the charge of debts or legacies was not of itself sufficient to break the course of a descent, *Chaplain* v. *Leroux* (*d*)); and he urged that, in cases of ambiguity, the law preferred the paternal line. *Dougl.* 778.

Cur. adv. vult.

The following certificate was afterwards sent:

This case has been argued before us by counsel, we have considered it, and are of opinion,

First, That the instrument dated the 25th *August*, 1819, executed by the said *Margaret Langley*, does not, as to the estates comprised in the said indenture of the 14th *October*, 1786, and the said fine, operate at law as an execution of her power of appointment, but as a devise by her by force of her interest

Secondly, This question does not arise.

(*a*) *Com.* 72. 1 *Salk.* 241. *S. C.*
(*b*) 2 *Str.* 1270.
(*c*) 3 *Levinz.* 127.
(*d*) 5 *M.* & *S.* 14.

Thirdly,

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Thirdly, We are of opinion, that *Thomas Langley*, her son, took by descent from his mother, and not by purchase.

R. DALLAS.
J. A. PARK.
J. BURROUGH.
May 14th, 1822. J. RICHARDSON.

DARTNALL *v.* Marquis WELLESLEY.

May 9.

Where an annuity is sought to be set aside for an illegality in the payment of the consideration, there must be an affidavit of the circumstances from the grantor himself.

PELL Serjt., on behalf of certain trustees, to whom the marquis had assigned all his property in trust for his creditors, and who were authorised to contest improper claims, moved to set aside an annuity granted by him to *Dartnall* and others, on a statement by affidavit, in which, from entries in the books of *Howard* and *Gibbs*, the sufficiency of the consideration paid was impeached, and the payment was averred to have been made by *Howard* and *Gibbs*, and not by *Dartnall*, &c.; but no affidavit from the marquis being produced, the Court refused to interfere, observing, that the trustees could not state so well, as the grantor, the circumstances of the original transaction, and

Pell took nothing by his motion.

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May 10.

MAYNARD v. BRIGHT.

In *C. B.*, where a Defendant under a rule *nisi* for that purpose files pleas of several matters, annexing to the plea a copy of the rule *nisi*, indorsed with a notice, that a rule absolute to plead several matters will be served as soon as it is drawn up, the Plaintiff may not sign judgment as for want of a plea, if the time for pleading should expire before the rule absolute be obtained.

THE Defendant, who was under terms to plead issuably to an action for goods sold and delivered, filed pleas of several matters, (to wit, the general issue and coverture of Plaintiff,) annexing to the plea, a copy of a rule nisi to plead several matters which had been taken out on the preceding day, and upon which was indorsed, that a rule absolute to plead several matters would be served as soon as it was drawn up; and, on the same day, the Defendant acquainted the Plaintiff's attorney with these circumstances.

The next day, the time for pleading being out, and the rule absolute for pleading several matters not having been obtained, the Plaintiff's attorney signed judgment, on the ground that, till the rule absolute for pleading several matters had been obtained, the plea filed was a nullity.

Lens Serjt. having on a former day obtained a rule *nisi* to set aside this judgment for irregularity,

The *Secondary* now informed the Court, that, although there was no decision on the subject, it had always been the practice to consider in such a case, the filing pleas of several matters with the rule nisi annexed, indorsed with the notice of a rule absolute, sufficient.

Whereupon the Court set aside the judgment without costs, and said this should be considered as the practice for the future.

Pell Serjt. shewed cause.

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Ex parte HAGUE.

May 10.

Attorney. Striking off the rolls.

PEAKE Serjt. moved to strike an attorney off the Rolls of this Court, upon the ground that he had some years ago been struck off the Rolls of the Court of King's Bench.

He referred to the rule of *Michaelmas* 1654 (*a*), by which it is ordered, that attornies struck off the Rolls of one Court for a misdemeanour, shall not practise in another.

But the Court refused the rule, the contents of the affidavits on which the Court of King's Bench acted, not having been stated, and there being no proof or allegation that the attorney had been struck off for a misdemeanour.

Vaughan Serjt. shewed cause against the rule.

(*a*) Rules and orders of the Courts of King's Bench and Common Pleas.

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May 11.

THE Plaintiff sued the Defendant in this Court, and gave in the following particular of his demand.

By the *Rochester* court of requests' act, 22 *G.* 3. *c.* 27., debts under 40*s.* contracted within the jurisdiction of the court, are to be sued for in that court; by 48 *G.* 3. *c.* 51. the jurisdiction of the court is extended to sums not exceeding 5*l.*; and plaintiffs suing in the superior courts for sums recoverable under either of the acts, are to be refused costs, notwithstanding a verdict in their favour. But the latter act excludes any jurisdiction over debts being the balance of an account on demand, originally exceeding 5*l.* The Plaintiff sued in a superior court for 34*l* 5*s.* 1*d.*, ascertained by a surveyor, appointed by the Defendant and himself, to be due to him for measured work and labour, done within the jurisdiction of the court of requests. The Defendant proved payments to the amount of 24*l.* 18*s.*, and the jury estimating the work at only 26*l.*, found for the plaintiff only 1*l.* 2*s.* damages: Held, that this was not a case in which the Defendant was entitled under 48 *G.* 3. *c.* 51. to enter a suggestion to deprive Plaintiff of his costs.

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1821. *Charles Larkin* to *John Harsant.*

		£.	s.	d.
May.	Three days' work,	0	12	0
	Measured work,	33	13	1

At the trial of the cause at the last *Maidstone* assizes, a surveyor, who had been appointed by the Defendant and Plaintiff to measure the work as between them, said, that on such measurement, he brought the value of the work to 33*l.* 13*s.* 1*d.*

The Defendant proved payments on account, to the amount of 24*l.* 18*s.* The jury found a verdict for the Plaintiff, and estimated the value of the work at 26*l.*, leaving him thereby 1*l.* 2*s.* for his damages, instead of the balance of 9*l.* 7*s.* 1*d.*

Bosanquet Serjt. on a former day, upon an affidavit (which stated, that at the time of the commencement of the above action, the Defendant was not indebted to the Plaintiff in any sum amounting to 40*s.*, and that at the time of the commencement of such action, the Defendant was an inhabitant of and resident within the city of *Rochester*, and liable to be warned and summoned for the debts, on account of which a verdict was given in the said action before the Court of Requests, mentioned in a certain act of parliament of the 22d year of *George* 3d, intituled an act for the more easy and speedy recovery of small debts within the city of *Rochester*, and the parishes of *Stroud*, &c., in the county of *Kent*; and that such debt was contracted within the city of *Rochester* aforesaid,) obtained a rule to shew cause why the Defendant should not enter a suggestion upon the roll, under the 22 *G.* 3. *c.* 27. *ss.* 12., and 32 and 48 *G.* 3. *c.* 51. *ss.* 13 and 14.

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By the 12th section of 22 *G.* 3. *c.* 27., (the *Rochester* Court of Requests act,) it is enacted, that debts under 40*s.* contracted within the jurisdiction of the court, are to be sued for in that court;

By the 32d section, "That no action or suit for any debt not amounting to forty shillings, and being upwards of two shillings, and recoverable by virtue of this act in the said Court of Requests, shall be brought against any person residing or inhabiting within the jurisdiction thereof, in any of his majesty's courts of record at *Westminster* or elsewhere, or in any courts whatsoever, other, than in the said Court of Requests, and the Court Portmote thereinafter mentioned, and that no suit which shall be commenced in the said Court of Requests in pursuance of this act, nor any proceedings which shall be had therein, shall or may be removed or removeable by *certiorari*, or otherwise, into any other court whatsoever, but that the judgment, decrees, and proceedings of the said Court of Requests shall be final and conclusive to all intents and purposes."

By the 48 *G.* 3. *c.* 51. *s.* 1., it is enacted, (after reciting the before mentioned act, and that it would greatly tend to the improvement and encouragement to the trade of the said city of *Rochester*, &c. and to the necessary support and protection of useful credit within the same, if the powers of the said act were extended to the recovery of small debts not exceeding 5*l.*,) that so much of the said act as confines or restrains the cognizance or jurisdiction of the Court of Requests for the said city and parishes to any debt or debts not exceeding the sum of 40*s.*, should from and after the 24th *June*, 1808, be, and the same is thereby repealed.

By the 13th section it is enacted, "that nothing in this act contained shall extend, or be construed to extend, so as to enable the said commissioners

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to determine the right or title to any lands, tenements, or hereditaments, or real estates whatsoever, or to judge, determine, or decide, on any debt where the title of the freehold, or lease for years, or lives, of any lands, tenements, or hereditaments, of any chattels real whatsoever, shall be brought or come into question, nor any debt which shall not be for the payment of a sum certain, nor any debt for any sum, *being the balance of an account on demand originally exceeding* 5*l.*; or to judge, determine, or decide on any debt that shall arise by reason of the occupation of lands, tenements, or hereditaments, situated elsewhere than in the said city or parishes, or one of them; or by reason of any cause concerning testament or matrimony, or any thing concerning, or properly belonging to the ecclesiastical court, or for, or concerning any agreement by way of composition, for, or by way of retainer of tithes, or for any matter, or for any matter sueable therein, any thing in the said recited acts, or this act, contained to the contrary thereof notwithstanding;"

By section 14th, "If any action or suit shall be commenced in any of his majesty's courts of record at *Westminster*, for any debt not exceeding the sum of 5*l.*, and recoverable by virtue of the said recited act, and of this act, or either of them, in the said Court of Requests, then and in every such case the Plaintiff or Plaintiffs in such action or suit shall not, by reason of a verdict for him, her or them, or otherwise, have, or be entitled to any costs whatsoever."

It was contended, that the present was a case within the 22 *G.* 3., which indeed contained no provision for entering the desired suggestion; but that it might nevertheless be entered under that act by virtue of the 14th section of 48 *G.* 3, which expressly referred to cases within the 22 *G.* 3. Though it was admitted, that if it had been desired to enter the suggestion under

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under the 48 *G.* 3., the Defendant would have been prevented from doing so, by the exception in the 13th section of that act. However, there was no such exception in the 22 *G.* 3., and *Clark* v. *Askew* (*a*), *Horn* v. *Hughes* (*b*), and *Bateman* v. *Smith* (*c*), all decided that, whatever doubt there may be as to a debt reduced by set off, a debt reduced by payments or infancy within the sum of 40*s*. is subject to the provisions of the court of conscience acts; the authority of *M'Collam* v. *Carr* (*d*) was doubted in *Clark* v. *Askew*, and in *Fountain* v. *Young* (*e*) there was an exception which took the case out of the act.

Taddy Serjt. now shewed cause against the rule. In *Clark* v. *Askew*, the original demand was on a promissory note, as to the amount of which there could be no dispute. In *Bateman* v. *Smith*, the Defendant was an infant, and, therefore, the greater part of the debt had no existence in contemplation of law; but the claim for which the present Plaintiff sues, is not a *debt contracted* within the meaning of the 22 *Geo.* 3., but a sum due on a *quantum meruit*, about which there might reasonably be a difference of opinion, and which a surveyor appointed by the Defendant, found to be quite sufficient in amount to justify the Plaintiff's suing in a superior court; and it is within the exceptions of the 13th section of 48 *Geo.* 3. In *Horn* v. *Hughes*, Lord *Ellenborough* seems to think, that if a Plaintiff has a reasonable ground for suing for more than 5*l*., he ought not to be deprived of his costs.

(*a*) 8 *East*, 28.
(*b*) 8 *East*, 347.
(*c*) 14 *East*, 301.
(*d*) 1 *B.* & *P.* 223.
(*e*) 1 *Taunt.* 60.

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Bosanquet, in support of his rule, cited, in addition to the cases already mentioned, *Fitzpatrick* v. *Pickering* (*a*) and *Gross* v. *Fisher* (*b*), to shew, that a demand reduced by payments below 40*s.*, was within the spirit of all these acts, and *Benson* v. *Hemming* (*c*), to shew, that they they were all in *pari materiâ*, and ought to receive a uniform construction; he urged that the debt mentioned in the statute can only be the sum which the jury ultimately find to be due, and not the sum which the Plaintiff has chosen to claim; and that Lord *Ellenborough*, in *Horn* v. *Hughes*, had specified the default of a witness as the only reason for refusing a suggestion.

Dallas C. J. I think that this is not a case within the meaning of the statute, and that the proposed suggestion ought not to be entered. It is clear, that, in passing acts of this description, the legislature intended to afford encouragement to poor people, by protecting them against an increase of expense on demands, which may be decided cheaply in the inferior court; therefore, where the original demand is under 40*s.*, the action should be brought in the inferior court, and the party is entitled to a suggestion, if called on for costs in the court above. This is clearly the case, where a simple money demand, originally greater than 40*s.*, has been reduced by payments below that sum. I forbear to enter into the consideration of the case of a money demand, reducible by set-off; but there are many aspects in which the claim of a party to enter a suggestion under the statute may present itself to this court. First, where a demand greater than 40*s.* has been reduced to less than 40*s.* by payments on account; secondly, where it may be reducible by set-off; thirdly, as in the present

(*a*) 2 *Wils.* 68. *b.*
(*b*) 3 *Wils.* 48.
(*c*) 2 *Barnes*, 282. 1st ed. 1754.

case,

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case, where there is a demand for measured work and labour, and in which it may have been a fair question for a jury to decide what is due. It seems, that in such a case, the jury may, without any imputation on the fairness of the Plaintiff's proceedings, find less to be due than the sum actually demanded; and, with a view to the decision on a motion like the present, it must be always a question, whether or no the Plaintiff had reasonable and probable cause to litigate such a demand. It is only necessary, therefore, for me to advert to what is laid down by Lord *Ellenborough*, in *Horn* v. *Hughes*. "It is unnecessary to say what we might have thought, if it had appeared that the Plaintiff had a reasonable ground for bringing his action for more than 5*l*., but that from the absence of a witness, or other cause without his default, he had failed in proving his whole demand." This, then, is a case in which that appears which did not appear to Lord *Ellenborough*; for what are the facts before the Court; that the Plaintiff performs for the Defendant measured work, which, according to an estimate by a surveyor of the Defendant's own appointment, amounted to a sum, which, after all the payments, would have left a clear balance of more than 9*l*. due to the plaintiff; and if the Defendant refused to pay this, what remedy had the Plaintiff but by suing in a superior court? Had not a man who agreed fairly to the valuation of his work a right to sue for the amount which the valuer found to be due? But it has been urged, that Lord *Ellenborough* specified the default of a witness as a reason for refusing the suggestion, as if the loss of the requisite verdict, by an unforeseen accident, were the only reason which should exempt the plaintiff from losing his costs. However, it may fairly be presumed, that Lord *Ellenborough* mentioned the default of a witness only, as one out of many instances, and that he did not limit the Plaintiff's

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exemption to the case of such an accident. Therefore, without going into the other points, I think there is sufficient on the affidavits before the Court, to enable us to say that the action was properly brought in the court above, and that there is no ground for entering the proposed suggestion.

PARK J. I am of the same opinion. In the 48 *Geo.* 3. *c.* 51., that act is said to be passed for the recovery of small debts; but when we see by the affidavits, that this is not a small debt, but a demand for more than 34*l.*, depending on measure and valuation, how can we say it is within the statute; the parties agree to an estimate being taken, and more than 9*l.* being due on the balance, there was surely a sufficient reason for resorting to the superior court, and a cause of contest which could not with propriety be submitted to a court of conscience. *Horn* v. *Hughes* is rather in favour of the Plaintiff than against him, according to the language of Lord *Ellenborough.*

BURROUGH J. In all these cases much must be left to the discretion of the Court, upon the facts as they appear in evidence. The intention of the legislature was, that the suggestion as to costs should be applied to cases where there was a clear demand for less than 40*s.*; but if we look at the facts of this case, we can have no doubt that it is not one of that description. Here is a demand for more than 34*l.*, a valuation by consent of both parties, a balance struck, particulars of demand given, and the valuer called; and though, for some reason to us unknown, the jury have found a verdict for less than the balance, I am satisfied, on the merits of this case, that it is not within the act. What Lord *Ellenborough* says in *Horn* v. *Hughes*, about the default of a witness, is only put as an instance, and not as a

limitation

limitation of the principle laid down by him. There is no ground for the present application; and if it were necessary to go into it more particularly, I should be of opinion that this case falls within the exception of the second act, and does not come under the first. 1822. HARSANT v. LARKIN.

RICHARDSON J. If this application rested on the first of the two acts, it ought not to have been reserved for a motion, but to have formed part of the defence on the trial; this has not been done, and the Defendant now applies under the 14th section of the last act; but the last act did not mean to give the benefit in such a case. There is an exception in the 13th section, namely, "for any sum being the balance of an account on demand, originally exceeding 5*l.*" And this ought to be borne in mind when we proceed to the 14th section. I think the Court ought not to allow the suggestion here, and the rule must be

Discharged.

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The ATTORNEY-GENERAL and JOHN MILNE v. WILKINSON and Others.

By a deed of feoffment of 1621, Sir *N.S.* (in consideration of 100*l.* paid by the feoffees and the other inhabitants of *Enfield*, and of a free school for ever, to be held for the instruction of the children of inhabitants of *Enfield*,) granted certain lands to fourteen feoffees, to the intent that they and their heirs should pay 20*l.* a-year out of the rents towards the maintenance of a schoolmaster for such school, and the residue for other purposes, provided that no act concerning the lands or their rents should be done, but in a vestry, or meeting of the feoffees, and ten at least of the inhabitants of *Enfield*, which should be vestry-men, and not feoffees, in a vestry to be held by them in a chamber over the school, or in the vestry, situate in the parish church, upon public warning, to be given in the church the *Sunday* before the meeting. Schoolmasters were to be elected in this way within three months after every vacancy, and were to give a bond to three feoffees to resign the appointment upon half-a-year's warning by the feoffees, or any of them, so it were with the consent and agreement of the feoffees and vestry-men, or the most part of them, which should be assembled in a vestry or meeting, to be held as aforesaid, so always as at least ten of the vestrymen which were not feoffees should vote at the holding of the vestry. Two feoffees were to receive the rents, and account for them the *Sunday* after the receipt, at a vestry, consisting of the persons before described, and held and convened in the mode before mentioned. When the feoffees should be all dead but five, four, or three, at the least, or gone to live out of the parish, the survivors were to enfeoff fourteen others, of discreet and wealthy men, then inhabitants in the parish, to be chosen by the vestry-men of the parish, or the greater number at a vestry, to be holden in the manner before described: Held that, in the execution of the power of removal of the schoolmaster, the votes were to be taken *per capita*, and not according to the provisions of 58 *G.* 3. *c.* 59.

THIS case, directed by the Vice-Chancellor, for the opinion of the Court of Common Pleas, was as follows.

By an indenture of feoffment of two parts, dated *September* 1st, 1621, and made between Sir *Nicholas Salter*, Knt., *Nicholas Bainton*, and *Benjamin Decrow*, of the one part, and fourteen feoffees therein named and described, of the other part, *Salter*, *Bainton*, and *Decrow*, as well in consideration of 100*l.* paid by the fourteen feoffees, and the residue of the inhabitants of the town of *Enfield*, in the county of *Middlesex*, as in consideration of a free school, for ever, to be held

for

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for the instruction of the children of the inhabitants of *Enfield*, granted and confirmed to the fourteen feoffees, certain lands and premises therein particularly described, to have and to hold to them, their heirs and assigns, to the use of them, their heirs and assigns for ever, on condition of performing the intentions expressed in a schedule annexed to the indenture, which schedule, executed by the same parties, and bearing the same date, witnessed, that the intent of the deed of feoffment unto that indenture annexed, was, that the said feoffees and the survivors of them, should from time to time, thenceforth for ever, pay 20*l*. a-year of the rents and profits of the lands and tenements mentioned in the deed of feoffment, for and towards the maintenance of a learned, meet, and competent schoolmaster, to keep a free-school, for the teaching and instructing of the children of all the inhabitants of the parish of *Enfield*, in the new-built school there, and should dispose of all the residue thereof, for and towards the relief of poor orphans, and other poor and impotent people of the parish of *Enfield*, for the time being, and to any other good and charitable uses to be done and performed within the parish of *Enfield* (except so much thereof as should be sufficient to pay and discharge the quit rents, and all other reprises, together with all such other charges and expenses as should from time to time thenceforth grow to be due and payable,) with this intent, meaning, and full agreement between all the parties, that the feoffees and their heirs, and all others who thereafter should be feoffees of the premises, and their heirs for the time being, should not do any act, &c. concerning the lands and tenements contained in the deed of feoffment or the rents, issues, or profits thereof, but in a vestry or meeting of the feoffees, and ten at the least of the inhabitants of the said parish of *Enfield* for the time being, which

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which should be vestrymen in the said parish, and not feoffees, in a vestry to be held by them in the chamber over the said new built school, or in the vestry situate in the parish church of *Enfield*, upon public warning to be given thereof in the same parish church, upon the *Sunday*, in the forenoon, next before such meeting or vestry, the warning to be given immediately after the end of divine service and sermon, if any there should be; and the said parties did, by their mutual and general agreement, choose *Richard Ward* to be schoolmaster, to teach the children of all the inhabitants of the said parish, being or to be scholars in the said free-school, at and for the yearly wages aforesaid, to be paid as aforesaid; and that whensoever the said *Richard Ward*, or any other who should thereafter be schoolmaster of the said free-school, should be dead, avoided, and put away, or departed and gone, there should be, within three months thence next ensuing, one other meet schoolmaster, elected to teach the scholars in the said school, in form aforesaid, so as the said free-school should not, at any time thereafter, be unprovided of a meet and competent schoolmaster, by the space of three months together at any one time. And the farther intent and meaning of those presents was, that the said *Richard Ward*, and every other person which should at any time thereafter be elected and appointed to be schoolmaster of the said school, should, before he intermeddled to be schoolmaster, enter into bond unto three of the feoffees for the time being, in such competent sum of money as the said feoffees and vestrymen, or the greater number of them, should appoint, upon condition to depart and give over from being schoolmaster of the said school, and also to yield up in peaceable manner the possession of the house appointed for his habitation in *Enfield* aforesaid,

said, upon half one year's warning, to be given unto him by the said feoffees, or any of them, so it were with the consent and agreement of the feoffees and vestrymen, or the most part of them for the time being, which should be assembled in a vestry or meeting to be held as aforesaid, so always as there should be, at the least, ten of the vestrymen which should be not feoffees, vote at the holding of the vestry in which the putting away of any schoolmaster should be determined; and also, that there should be yearly and every year, for ever, by the greater number of the said vestrymen for the time being, in a vestry to be held as aforesaid, two of the said feoffees (for the time being) appointed to be receivers of the rents, issues, and profits of the said premises, and none others, for one year thence next ensuing, which said receivers should not detain or keep the same, or any part thereof, in their or either of their own custody, longer than the Sabbath-day next after the receipt thereof, upon which day they should cause warning to be given, of a vestry in form aforesaid, to be held in the afternoon of the same day, at which vestry they should bring with them all such money as they should have received, and so much thereof as they should not then and there disburse and pay away, by and with the consent of the feoffees and vestrymen of the said parish for the time being, or the greater number of them, so as there be present ten at the least of the said vestrymen which should be not feoffees, the said receivers should forthwith lay up in the storehouse of the said parish, &c. Then followed a provision, that if any of the feoffees quitted the parish, they should release their interest to the feoffees who remained there.

And further, also, it was the intent of the said deed, and the agreement of all the parties to those presents, when the feoffees in the said deed of feoffment should be

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be all deceased or gone to dwell out of the parish of *Enfield*, except five, four, or three of them at the least, then the said five, four, or three so surviving, and inhabiting the parish of *Enfield*, within one quarter of a-year then next following, upon reasonable request and at the costs of the said five, four, or three surviving to be paid out of the revenues of the said premises, should make one other deed of feoffment, by which they should enfeoff fourteen other persons at the least, of discreet and wealthy men, then inhabitants in the said parish, to be elected, nominated, and chosen by the vestrymen of the same parish for the time being, or the greater number of them, at a vestry to be held, upon public warning to be given as aforesaid for the holding thereof, of and in the said lands and tenements, with the appurtenances, in such like manner and form, and to the like intents and purposes in all respects as in the said deed of feoffment and in that schedule were expressed.

Livery of seisin of the several hereditaments and premises comprised in the aforesaid indenture, was duly given to the several feoffees therein named, and the Defendants in this suit are the present feoffees of the said charity estates.

In the month of *April*, 1791, the Plaintiff, *John Milne*, was duly elected and appointed to be master of the said free-school, and upon such appointment he gave a bond to resign that office, as directed by the schedule annexed to the said indenture of feoffment.

The question referred for the opinion of the Judges of this Court was, whether, in the execution of the power of removal given by the said schedule annexed to the said indenture of feoffment, dated the 1st *September*, 1621, to the feoffees of the charity estates and vestry in the parish of *Enfield*, the votes are to be taken *per capita*, or according to the provisions of the act of parliament,

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liament, passed in the 58th year of the reign of his late majesty, King *George* the Third, intituled, "An act for the regulation of parish vestries."

Hullock Serjt., for the Plaintiff. The votes are to be taken *per capita*. The 58 *Geo.* 3. *c.* 69., applies only to parish vestries, convened for the purpose of regulating the rates, and not to assemblages of trustees, such as those described in the schedule of this conveyance. Those trustees assemble, either under a special usage, or under the provisions of the founder's deed; if under the former, they are excepted by the act; if under the latter, the voting according to the provisions of the act, would have a tendency entirely to alter the property settled by the deed.

Taddy Serjt, contrà. From the language of the deed, — the injunction that the vestrymen should attend, — the circumstances that all the parish is interested in the property conveyed by the deed, — and that the consideration moved in part from the parish, it seems to have been intended, that the meetings for the regulation of this property should be parish vestries; if so, they must be regulated by the provisions of the late act; and those provisions would not tend to alter the property, but would merely affect the manner of conducting the meeting. The description of persons to be appointed as feoffees under the deed, are precisely such as would be parish vestrymen. *Gibson*, 219. 4 *Burn's Ecclesiastical Law*, tit. *Vestry*. The special usage mentioned in the act can only refer to a legal usage of the date of *Richard* the First.

Hullock, in reply. The word vestrymen, in the deed, is only a word of description, as to the sort of persons who should be associated with the feoffees, and affords no

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no indication that the meeting was intended to be a parish vestry. The special usages referred to by acts of parliament, are seldom confined to strict legal customs, but include others generally known, such as husbandry customs, many of which could scarcely have existed at so early a period as the time of *Richard* the First.

The following certificate was afterwards sent.

This case has been argued before us by counsel; we have considered it, and are of opinion, that, in the execution of the power of removal given by the schedule annexed to the indenture of feoffment, dated the 1st day of *September*, 1621, to the feoffees of the charity and vestrymen of the parish of *Enfield*, the votes are to be taken *per capita*, and not according to the provisions of the act of parliament of the 58th year of the reign of King *George* the Third, intituled "An act for the regulation of parish vestries."

R. DALLAS.
J. A. PARK.
J. BURROUGH.
J. RICHARDSON.

May 15.

COSTER *v.* MEREST.

Where it was sworn that hand bills, reflecting on the Plaintiff's character, had been distributed in court, and shewn to the jury on the day of trial, the Court would not receive from the jury affidavits in contradiction; and granted a new trial against the Defendant, though he denied all knowledge of the hand bills.

VAUGHAN Serjt. had obtained a rule *nisi* for a new trial in this case, on an affidavit which stated, that hand-bills reflecting on the Plaintiff's character had been distributed in court at the time of the trial, and had been seen by the jury.

Lens

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Lens Serjt., who shewed cause against the rule, offered affidavits from all the jurymen, that no such placard had been shewn to them, and though he admitted, that, in general, affidavits on the subject of the cause could not be received from a juryman; yet he urged, that, as in the present case no answer could be given to the Plaintiff's statement except by such affidavits, they ought to be received.

But the Court refused to admit the affidavits, thinking it might be of pernicious consequence to receive such affidavits in any case, or to assume that a jury had been unduly influenced; and though the Defendant denied all knowledge of the hand-bills, they made the rule

Absolute.

CLARKE and Another *v.* YEATES.

May 15.

The Defendant, on being arrested, paid, under 43 *G.* 3. *c.* 46., the debt, and 10*l.* for costs, (which 10*l.* was more than sufficient to cover the costs,) and informed the Plaintiff's attorney that he should reclaim only the surplus which might remain after payment of debt and costs; the Plaintiff's attorney, on the sheriff's omitting, after request, to remit the money, proceeded in the action, and incurred further costs: Held, that the Defendant was not liable to pay the costs so incurred after the arrest.

THE Defendant being arrested for 54*l.*, on the 1st of *October* last paid into the hands of the sheriff's officer 64*l.*, under the statute 43 *G.* 3. *c.* 46. *s.* 2. (*a*) The sheriff's officer signed and gave a stamped receipt as follows.

Clarke and *Dimsdale* v. *Yeates.*

Received *October* 1st, 1821, of Mr. *James Yeates*, 64*l.* for debt and costs in the above suit.

The

(*a*) By which it is enacted, "That all persons who shall be arrested upon mesne process, within those parts of the United Kingdom of *Great Britain* and *Ireland* called *England* and *Ireland*,

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The Defendant's attorney then informed the Plaintiffs' attorney, that the money was in the hands of the sheriff, and that the Defendant did not mean to make any claim, except for the surplus which might remain after payment of debt and costs. The Defendant's attorney said the costs would be about 4 or *5l.*, and they did not amount to more up to the time of the arrest.

The Plaintiffs' attorney immediately wrote to the under-sheriff, requiring him to remit the debt and costs to the amount of 60*l.* 6*s.* 7*d.* The under-sheriff omitting to do this, and the money not being paid into court at or before the return of the writ, the Plaintiffs' attorney, on the first day of *Michaelmas* term, filed a declaration *de bene esse*, and gave notice thereof. In the same term he moved the Court to compel the sheriff to pay in the money, which was done in *Hilary* term last, when the money was taken out of Court in the usual course. The Plaintiffs' attorney having then taxed his costs, which amounted by the allocatur to 30*l.* 10*s.* 6*d.*, demanded of the Defendant 24*l.* 3*s.*, in addition to the sum of 64*l.* already paid.

Pell Serjt. now moved, that all further proceedings in this cause should be stayed, the debt and costs in the action having been paid on the 1st of *October*, 1821.

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land, shall be allowed, in lieu of giving bail to the sheriff, to deposit in the hands of the sheriff, by delivering to him or to his under-sheriff, or other officers to be by him appointed for that purpose, the sum indorsed upon the writ, by virtue of the affidavit for holding to bail in that action, together with 10*l.* in addition to such sum, to answer the costs which may accrue or be incurred in such action up to and at the time of the return of the writ; and also such further sum of money, if any, as shall have been paid for the king's fine upon any original writ, and shall thereupon be discharged from such arrest as to the action in which he, she, or they shall so deposit the ——— sum indorsed on the writ."

Vaughan

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Vaughan Serjt. shewed cause in the first instance, contending, that when the sheriff omitted to remit the money, the Plaintiffs were obliged, with a view to their own safety, to take the course which had been pursued, and urged that the statute never proposed to make a Plaintiff suffer for the sheriff's default.

But the Court thought that, under the statute, the Defendant could not be permitted to suffer, after having paid sufficient to cover debt and costs up to the time of his arrest; and they made the

Rule absolute. (*a*)

(*a*) See *Tidd's Practice*, p. 231. *et seq.* 6*th* edit.

GIDLEY, Executor of HOLLAND *v.* Lord PALMERSTON.

May 17.

An action does not lie against a public officer by individuals for sums which, as a public officer, he is authorised to pay them, although he may have received the money applicable to that purpose: Held, therefore, that *assumpsit* does not lie against the secretary at war by a retired clerk of the war office for his retired allowance, although the secretary at war had received the money applicable to such allowance.

ASSUMPSIT brought by the Plaintiff as executor of *Christopher Holland*, deceased, against the Defendant; the first count of the declaration stated, that the said *Christopher Holland* had been one of the established clerks in the war office, and, before the time of the promise mentioned in the first count of the declaration, had been permitted to retire from such office, and as such retired clerk, had been allowed, and was duly entitled to receive from the public monies of the united kingdom, the sum of 200*l.* in each and every year, as a compensation or retired allowance for his services, as such clerk as aforesaid; that the Defendant, at the time of making such promise, was the secretary at war, and, as such, was at the head of the said war office; that the several sums of money necessary for

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the payment of allowances or compensations granted as retired allowances, to any person having held any employment in the war office, were, in every year, amongst other sums of money, placed by act of parliament, at the disposal of the secretary at war for the time being, to enable him to defray the charges of such compensations or retired allowances; and it was his duty to pay them over, or permit them to be received by the persons respectively entitled to receive the same; that the sum of 200*l.* (the retired allowance which *Christopher Holland* was annually entitled to receive,) had been in the respective years, 1816, 1817, and 1818, (amongst other things) duly voted and granted by act of parliament, for the due payment of the allowance to the said *Christopher*, as such retired clerk, and had been, and was in the same years respectively placed by act of parliament, at the disposal of the Defendant as the secretary at war, for and during those years respectively; whereupon, it became the duty of the Defendant as such secretary at war, in each of the said years, to have paid over, and to have suffered the said *Christopher Holland*, to receive the said 200*l.* in each of those years. The declaration further stated, that the sum of 600*l.* being due and unpaid, for the amount of the said retired allowance for the three several years aforesaid, the Defendant, in consideration thereof, undertook and promised the said *Christopher Holland* in his lifetime, to pay over to him, or to permit him to receive the said sum on request, and then averred a breach of the promise; *viz.* that the Defendant would not pay over to *Christopher Holland* in his lifetime, nor to the Plaintiff as executor since his death, neither would he suffer the said *Christopher Holland* in his lifetime, nor the Plaintiff, as executor since his death, to receive the said sum, but that the same was still wholly unpaid. There were counts in the

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the declaration for money had and received to the use of the testator, and on an account stated. The Defendant pleaded the general issue, and upon the trial of the cause before *Dallas* C. J., at the sittings for *Middlesex* after *Hilary* term, 1820, a verdict was found for the Plaintiff with 350*l.* 10*s.* damages, subject to the opinion of the Court on the following case.

Christopher Holland, the testator, who had been for many years one of the established clerks in the war office, on the 9th *March*, 1815, obtained leave to retire from his situation, and, upon the recommendation of the secretary at war, and by the authority of the lords commissioners of his majesty's treasury, was placed upon the list of retired established clerks of the war office, with an allowance of 200*l.* a year, commencing from the 3d of the same month of *March* inclusive, the allowance being granted to him with the due observance of the statute 50 *G.* 3. *c.* 117. *Holland* continued upon such list of retired established clerks from the said 3d of *March*, until the 25th of *August*, 1818, when he died, having first made his will, and thereof appointed the Plaintiff, his executor, who, after his death, duly proved the will. The Defendant, during the whole of the said period, and at the time of the commencement of this action, was his majesty's secretary at war. The mode in which the compensations or retired allowances granted to the retired clerks, are provided for, is as follows: estimates are drawn up every year, entitled "Estimates of army services," containing separate estimates of all the allowances, compensations and emoluments in the nature of any superannuation or retired allowances, to any persons in respect of their having held any public offices or employments of a civil nature, and prepared agreeably to the act 50 *G.* 3. *c.* 117. The estimates are laid before the Commons

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House of Parliament, and, after having been voted by parliament, the payment of the several sums so voted, are provided for by an act of parliament passed for that purpose. One of the heads of such estimates so laid before, and voted by parliament during the several years of 1815, 1816, 1817 and 1818, was entitled as follows: *viz.* "*Great Britain*, for an allowance to the secretary at war, to enable him to defray the charge of compensations or retired allowances to the following persons formerly employed in his office;" one of the items contained under that head is entitled as follows: "To one retired established clerk, 200*l.*," and the person to whom that description applied, was the said *Christopher Holland*. In this manner, the sum of 200*l.* had been regularly included in the sum voted in each of the said years, and the appropriation thereof provided for by an act of parliament, as the compensation or retired allowance of one retired established clerk, during each of those years respectively. The mode in which the money so voted, is placed at the disposal of the secretary at war, is as follows. The entire amount of the estimates of army services for the current year is, in the first instance, impressed from the exchequer into the hands of the paymaster-general: there is a warrant issued by the lords of the treasury to the paymaster-general, in the following form; that is to say, "By his Royal Highness, the Prince Regent of the united kingdom of *Great Britain* and *Ireland*. *G. P. R.*, Whereas the parliament of the united kingdom of *Great Britain* and *Ireland* hath made provision for various services connected with the expenditure of his majesty's land forces for the year 18 , our will and pleasure therefore is, that the accompanying establishments of the said services do accordingly commence and take place from the 25th day of *December* 18 , and continue in force

force until the 24th day of *December* 18 , both days inclusive, and that the amount of each of the said establishments be issued and applied by the paymaster-general of his majesty's forces, at such periods, and in such proportions, as shall from time to time be directed by his majesty's secretary at war, or in case of his majesty's forces serving abroad, by the officer commanding such forces, or by one of the comptrollers of army accounts, in pursuance of the regulations in this behalf established by us his majesty's high treasurer, or the commissioners of his majesty's treasury for the time being, or by any act of the legislature; but that no new charge be added thereto, nor any greater sum be issued on account of the said establishments than is herein authorised in each particular case, without being first communicated to us his majesty's high treasurer, or the commissioners of his majesty's treasury for the time." (The warrant here enumerated the various sums authorised to be paid, including an item for the superannuation and retired allowances, and also various deductions not affecting the present case:) "and for so doing, this shall be as well to the paymaster-general of the land forces, as to the commissioners for auditing public accounts, the commissary-general of musters, and all other persons whom it doth or may concern, a sufficient warrant, authority and direction. Given at our court at *Carlton* house, this day of 18 in the year of his majesty's reign. By command of his Royal Highness the Prince Regent, in the name and on the behalf of his majesty."

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Signed by three of the Lords of the treasury.

This warrant is under the royal sign-manual, and countersigned by the lords of the treasury. The secretary at war grants, from time to time, warrants upon the paymaster-general, for the payment of the sums placed

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by act of parliament at his disposal, which warrants from the secretary at war, are in the following form: *viz.* "Allowances, compensations and emoluments, in the nature of superannuation or retired allowances, &c. to persons belonging to the several public departments in *Great Britain.* Warrant. N. No. To the Right Honourable the Paymaster-General of his Majesty's land forces for the time being. You are hereby authorised and directed, out of such monies as are in, or shall come to your hands applicable to army services, to issue to *Robert Lukin,* Esq. or his assign, the sum of *l.* being towards defraying the retired allowances of persons formerly employed in the corresponding department of the war office, for the quarter ending on the 24th the same to be issued without deduction, and without other accompt than such as is liable to be rendered under the authority and direction of the secretary at war.

Signed *Palmerston.*

Given at the war office this day of 18 ."

"Received the day of 18 of the Right Honourable the Paymaster-General, the above sum.

Signed *Robert Lukin.*"

The paymaster-general, after the receipt of these warrants, draws upon the bank of *England* for the amount, and such amount is thereupon, by the said Mr. *Lukin,* first clerk to the secretary at war, paid into the bank of Messrs. *Biddulph* and *Cox,* the bankers of Mr. *Lukin,* and is entered by them in account with the first clerk of the war office: the money, when so paid, is at the discretion of the secretary at war, no minute of the treasury being necessary to take it out. The said first clerk acts as his cashier in the distribution

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of it, and the first clerk or his deputy, signs cheques on Messrs. *Biddulph* and *Cox*, for the quarterly payments of the said compensations and retired allowances in favour of the several parties entitled to them, according to the aforesaid estimates, or as he may be directed by the secretary at war. In this manner, the entire sums voted for the war department, for the years 1815, 1816, 1817 and 1818, have been received by the said Mr. *Lukin*, and by him placed in the hands of Messrs. *Biddulph* and *Cox* upon the account, and for the purposes before mentioned, and the sums retained out of the allowance to Mr. *Holland*, upon the settlement of the said accounts have been since paid by the said first clerk, to the account of the paymaster-general at the bank of *England*. The allowance of 200*l.* *per annum* was regularly paid to *Holland*, or to his order, from the 3d *March* 1815, to the 24th *March* 1816, previously to which time, *Holland* became embarrassed in his circumstances, and in consequence of certain pecuniary transactions of *Holland*, the defendant directed that 50*l.* a year only of the retired allowance should be paid to him from the 25th *March* 1816, and that the remainder should accrue as a fund for liquidating the claims of certain half-pay officers, widows and persons on the compassionate list, for whom *Holland* had acted as agent. *Holland* remonstrated against this suspension of the retired allowance, and requested the Defendant to allow it to be paid to him, and a correspondence took place upon the subject, which was terminated by a letter from the Defendant to *Holland*, dated on the 3d *February* 1817, in which the Defendant stated, "that it was quite impossible for him to authorize any issue to *Holland*, on account of his retired allowance." A commission of bankruptcy was issued against *Holland*, in *April*, 1816, under which he was duly declared a bankrupt, and obtained his certificate under the same, in the

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the month of *July* in the same year. At the time of the death of *Holland*, the sum which was retained out of his allowance for the purpose of liquidating the aforesaid claims, after deducting therefrom all the payments which had been made to him or to his order, amounted to 350*l.* 10*s.*, for the recovery of which sum the action was brought.

The question for the opinion of the Court was, whether the Plaintiff, as executor of *Holland*, was entitled to recover the said sum. If the Court should be of that opinion, the verdict was to be entered for the Plaintiff for that amount; if not, a verdict was to be entered for the Defendant, with liberty for either party to turn the case into a special verdict if the Court should so think right.

The case was argued in *Hilary* term last.

Taddy Serjt., for the Plaintiff. The questions are two; 1st, whether the Plaintiff's testator had a vested interest in the sum in dispute; 2d, whether, supposing he had such an interest, this action lies against the Defendant.

In the estimates, *Holland*, although not named, is described as certainly as if he had been named. "To one retired established clerk, 200*l.*;" and the case finds that this applies to *Holland*. The acts of parliament follow the same description; therefore, upon the face of the act (*a*) of parliament, and of the estimates, there was this sum applicable to the particular individual. When the estimates are prepared, a demand is made by the secretary at war, of certain sums for certain purposes; the parliament having sanctioned this demand the sums become vested in the individuals to whom they are voted, and if so, the Defendant had no right to stop this allowance.

(*a*) 58 *G.* 3. *c.* 101.

Secondly,

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Secondly, this action may be maintained against the Defendant; the money has been appropriated by parliament, and has been drawn for by the Defendant, under the terms in which it was appropriated; it has been paid to him for a specific purpose, and he is a mere trustee holding a given sum of money for a given individual; so that this Plaintiff has the same right as against any other individual, who may hold money for him. But it will be said, that the Defendant is secretary at war, and as such officer, no action can be maintained against him. The ground, however, upon which it is contended that public officers are not liable to actions at the suit of private individuals, is of modern introduction, and this case does not fall within that principle. In *Lane* v. *Cotton* (a) Lord *Holt* thought such an action maintainable, though the other three Judges differed. In *Whitfield* v. *Lord Le Despencer* (b), the Court held, that an action did not lie against the postmaster-general for the acts of the inferior officer; but, even there, Lord *Mansfield* held, that the postmaster-general would be liable for any act of his own. The present, however, is not the case of an act done by an inferior officer, it is the act of the secretary at war himself, and not an act done in the general duty of his department, or connected with the administration of army affairs.

Vaughan Serjt., for the Defendant. The money sought to be recovered in this action did not constitute a vested interest, but the secretary at war, as a public officer, had a right to control the payment of it. It would be of alarming consequence if this action should be deemed maintainable, for every man described in the act, even the private soldiers of the local militia, might then sue

(a) 1 *Ld. R.* 646. (b) *Cowp.* 754.

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the secretary at war; such actions have always been discountenanced, on the ground of public policy. *Macbeath* v. *Haldimand.* (*a*) The fallacy of the Plaintiff's argument consists in his considering the grant as a grant to the individual; but it is not a grant to the individual but to the crown. The terms of the vote of the Commons are, "It is the opinion of this committee that a sum not exceeding *l.* be granted to his majesty for defraying, &c." The sum is afterwards taken, it is true, with reference to persons who are supposed to be those who will be entitled to it; but it is only a mode of enabling his majesty to pay these allowances so long as he thinks fit. If the person described in the act has acquired a legal vested interest in the sum, should he die a day after the beginning of the year, his executors would be entitled to the whole 200*l.*; but the party here is dependent on the bounty of the crown, and his remedy is by petition to the crown or to parliament. The case expressly finds that the money is at the direction of the secretary at war.

Taddy, in reply. This is the case of an individual, to whom a grant is made of a given sum: where there is a general grant, such as the grants for postage, stationery, &c., the case is different, and no action can be maintained. If persons mentioned by name in these acts must petition the crown for redress of grievances, and the officer through whom they were to be paid should not be responsible, the alarm would be much more extensive, and the evil much greater than that occasioned to the officer by his own responsibility. If the party should die before the expiration of the year, as there would then be no claimant, the grant would be at an end. But it never can be contended, that a secretary at war is to have the

(*a*) 1 *T. R.* 172.

discretion

discretion of withholding pensions from those persons who are actually named in the act of parliament. 1822.

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DALLAS C. J., after stating the substance of the case, now gave judgment as follows: On these facts the question arises, whether, upon all or any of the counts in the declaration, the present action can be maintained: and we think that it cannot be maintained. It is not pretended that the Defendant is to be charged in respect of any express undertaking or agreement between him and the testator, or in respect of any other character than his public and official character of secretary at war.

It is in that character, and in that only, that his duty is alleged to arise; being, therefore, a duty as between him and the crown only, and not resulting from any relation to or employment by the Plaintiff, or under any undertaking in any way to be personally responsible to him. The money received is granted by the crown, subject only to the disposition or control of the Defendant, as the agent or officer of the crown, and responsible to the crown for the due execution of the trust or duty so committed. There is, therefore, no duty from which the law can imply a promise to pay to the testator during his life, or to his executor after his death, nor can money be said to have been had and received to the use of the testator, which money belonged to the crown, being received as the money of the crown, and the party receiving it being responsible only to the crown in his public character. On this view of the case, it appears to us, that this action cannot be maintained.

But it must fail also on another and a wider ground. This is an action brought against the Defendant, as paymaster-general, for an alleged breach of an implied undertaking, said to attach upon him in that character.

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With reference to this ground, it will be sufficient to advert to a class of cases, too well known and established to require to be more particularly mentioned, and which, in substance and result, have established, that an action will not lie against a public agent for any thing done by him in his public character or employment, though alleged to be, in the particular instance, a breach of such employment, and constituting a particular and personal liability; such persons, said Lord *Mansfield*, in one of the cases cited at the bar (*a*), are not understood personally to contract; and in the same case it was observed, by Mr. Justice *Ashhurst*, "In great questions of policy, we cannot argue from the nature of private agreements." —— "Great inconveniences would result from considering a governor or commander as personally responsible." —— "No man would accept of any office of trust under government upon such conditions; and, indeed, it has frequently been determined, that no individual is answerable for any engagements which he enters into on their behalf. There is no doubt but the crown will do ample justice to the plaintiff's demands, if they be well founded." Mr. Justice *Buller*, in the same case, adds, "Where a man acts as agent for the public, and treats in that capacity, there is no pretence to say that he is personally liable:" and, in a subsequent case (*b*), it is held, that a servant of the crown, contracting on the part of government, is not personally answerable. I am aware, that these cases are not, in their circumstances, precisely similar to the present; and, perhaps, in respect of some of the circumstances belonging to the present case, I may personally have doubted longer than, I am now satisfied, I ought to have done: but in their doctrine they go to this, that, on principles

(*a*) *Macbeath* v. *Haldimand*, 1 *T. R.* 172.

(*b*) *Unwin* v. *Wolsely*, 1 *T. R.* 674.

of

of public policy, an action will not lie against persons acting in a public character and situation, which, from their very nature, would expose them to an infinite multiplicity of actions, that is, to actions at the instance of any person who might suppose himself aggrieved: and though it is to be presumed that actions improperly brought would fail, and it may be said that actions properly brought should succeed; yet, the very liability to an unlimited multiplicity of suits, would, in all probability, prevent any proper or prudent person from accepting a public situation at the hazard of such peril to himself.

It is scarcely necessary to add, even to guard against any possible misconception, that the noble Lord who is the Defendant on this record appears, in point of fact, to have acted upon the purest motives of public and private justice to all parties concerned.

Upon the grounds which I have stated we are of opinion, that this action cannot be maintained, and that the judgment, therefore, must be for the Defendant.

Judgment for the Defendant accordingly.

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KINE v. BEAUMONT.

The copy of an original letter giving notice of the dishonour of a bill, is admissible in evidence, without notice to produce the original letter.

ACTION by the indorsee of a bill of exchange against the indorser. At the trial, before *Dallas* C. J., *London* sittings after last term, the Plaintiff offered to prove the notice of dishonor of the bill, (which notice had been given in a letter,) by a copy of the letter, taken at the time it was written; but did not prove any notice to the Defendant to produce that letter.

It was objected, that a copy of the letter ought not to be allowed in evidence, till it was proved that the Defendant had received notice to produce the original letter. A verdict was found for the Plaintiff, with leave for the Defendant to move to set it aside and enter a nonsuit, if this objection should be thought well founded.

Bosanquet Serjt., on a former day, obtained a rule *nisi* accordingly, relying principally on *Shaw* v. *Markham* (a), and *Langdon* v. *Hulls* (b); and citing *Grove* v. *Ware* (c), to shew, that Lord *Ellenborough*'s later opinion coincided with that expressed by himself and Lord *Kenyon* in the former cases.

Lens Serjt., who, on a subsequent day, shewed cause against the motion, argued that, whatever might have been the rule formerly, the notice of the dishonor of a bill, was, as to evidence, now placed on the same footing as notices to quit, &c. For this he cited *Ackland* v. *Pearce* (d), and *Roberts* v. *Bradshaw* (e), in which cases

(a) *Peake, N. P. C.* 165.
(b) 5 *Esp.* 156.
(c) 2 *Starkie, N. P. C.* 174.
(d) 2 *Camp.* 601.
(e) 1 *Starkie, N. P. C.* 28.

Lord

Lord *Ellenborough* seemed to have changed his former opinions on the subject. [*Park* J. *Roberts* v. *Bradshaw* was not merely a *nisi prius* decision. There was subsequently an application for a new trial, which the Court refused. *Burrough* J. There was also a motion for a new trial in *Ackland* v. *Pearce*, but without success.] *Lens* further urged, that the objections made to the admissibility of the copy in this case would apply equally against the practice in cases of notice to quit and notices of actions against magistrates; and further, that, in all cases of notice, copies made at the time were a species of duplicate original, which had always been held admissible. *Jory* v. *Orchard* (*a*), *Anderson* v. *May*. (*b*)

Bosanquet, in support of his rule. Neither a notice to quit nor a notice of action to a magistrate can be proved by a copy, where no notice has been given to produce the original notice, except in cases where the notice served was one of two duplicate originals, drawn out and signed at the same time and by the same hand. This was the ground of the decisions in *Jory* v. *Orchard*, *Anderson* v. *May*, *Gotlieb* v. *Danvers* (*c*), *Surtees* v. *Hubbard* (*d*), *Philipson* v. *Chase* (*e*); and forms the distinction to which the decisions by Lord *Ellenborough* seem always to have reference. In *Surtees* v. *Hubbard* he refers to the case of a notice to quit, and of such notices duplicate originals are usually made; but no case has decided that a copy of a notice to quit, where duplicate originals have not been drawn out, can be given in evidence, without proving notice to produce the notice served. *Ackland* v. *Pearce* and *Roberts* v. *Bradshaw* have not gone further than the preceding cases. In *Ackland* v. *Pearce* it does not appear that the notice

(*a*) 2 *B.* & *P.* 39.
(*b*) 2 *B.* & *P.* 237.
(*c*) 1 *Esp.* 455.
(*d*) 4 *Esp.* 203.
(*e*) 2 *Campb.* 110.

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served was not one of two duplicate originals, nor that the secondary evidence, which *Le Blanc* J. said might be admitted, was not the other; but as the analogy of a notice to quit was referred to, it may be presumed the notice in question was one of two duplicates. In *Roberts* v. *Bradshaw* the clerk received from his master two papers exactly alike, which the clerk compared with each other, and produced one of them, purporting to be notice of dishonour of the bill then in question; and the language of Lord *Ellenborough*, taken with reference to that fact, consists with his former opinion. The copy produced in the present case is not a duplicate original drawn out or signed by the same hand, but a mere copy, and it would be contrary to all principle to admit it, without first calling for the original.

DALLAS C. J. It appeared to me at the trial, that the objection there taken, and now supported, was well founded. So I thought originally; so Lord *Ellenborough* thought at one time; so Lord *Kenyon* thought. But, at the suggestion of counsel, and on a reference made to some of the later cases, a verdict was taken for the Plaintiff, and I saved the point for the opinion of this Court.

In the case of *Roberts* v. *Bradshaw*, Lord *Ellenborough* expressly says, that a letter acquainting a party with the dishonour of a bill, is in the nature of a notice, and that it is unnecessary to prove notice to produce such a letter. I own I do not see any great inconvenience which can arise, in practice, from giving notice to produce such a letter; but still the question comes to this, whether, in substance and reason, the law is not by the late determinations settled, that where a copy of a letter, containing notice of dishonour of a bill of exchange is tendered in evidence, such copy is admissible, without proving a notice to the party in whose possession the letter itself may be, to produce it.

I am

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I am not now going to enter into nice distinctions between a copy and a duplicate original; though I cannot see any great difference between a duplicate original and a copy made at the time; but, feeling the necessity that there should be an uniformity in the practice of the courts, we will enquire what the practice of the Court of King's Bench is on like occasions.

On this ground only we delay giving our judgment.

PARK J. In a suit against the acceptor of a bill, I do not see any inconvenience which can arise from admitting in evidence, the copy of the letter containing the notice of dishonour, without proof of notice to produce the original.

BURROUGH J. I can see no substantial distinction between a duplicate original and a copy made at the time.

RICHARDSON J. At present, I own I do not see any sound distinction between a duplicate original and a copy authenticated on oath.

Adjornatur.

And now,

DALLAS C. J. said, In this case we see no reason to change the opinion we in part expressed when the question was last before the Court; but, as a matter of general practice, we wished to collect the opinion of other Judges, and the result is, that the copy of an original letter, giving notice of the dishonour of a bill, is admissible, without notice to produce the original letter, and, consequently, that, in this case, the verdict must stand, and the rule to enter a nonsuit be

Discharged. (*a*)

(*a*) See *Phillipps's Evidence*, vol. i. 448. 5th edit.

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LOPES *v.* DE TASTET.

In an action on the case against an agent for misfeasance, the declaration, in addition to the counts on the misfeasance, contained two counts in trover, with an allegation of special damage. The Plaintiff failed in substantiating the counts for misfeasance, or the allegations of special damage, but recovered on the bare count in trover: Held, that he was entitled only to the costs of and occasioned by that count, divested of the special damage-allegation; but that he was entitled to a sum paid for the postage of foreign letters, sworn to be solely applicable to the cause.

No costs are allowed for the loss of a broker's time.

No costs are allowed for a witness who has not been paid before the claim is made.

THIS was an action on the case, brought against the Defendant for misfeasance, in his capacity of an agent. In addition to the counts containing the statement of this misfeasance, there were two counts in trover, with allegations of special damage. At the trial, before *Dallas* C. J., *London* sittings after *Trinity* term, 1819, the Plaintiff attempted to substantiate, but failed altogether on the counts for the misfeasance, and in the proof of the alleged special damage, but obtained a verdict on the bare count in trover.

The prothonotary, in taxing costs, allowed, among other items, sixteen guineas for the loss of time of sixteen brokers, who attended as witnesses, but, acting on the principle laid down in *Penson* v. *Lee* (a) (that where a party declares in several counts, and recovers only on a part of his declaration, he shall be allowed costs only for the part on which he recovers) he confined the costs to the part of the count in trover on which the Plaintiff had recovered, refusing to allow them on the counts for misfeasance, the allegations of special damage, or for any expenses occasioned in the endeavour to substantiate those counts or allegations. A sum of 500*l.*, charged for one of the witnesses on the count in trover, he refused to allow, because it had not been actually paid to the witness; and also the sum of 396*l.* 16*s.* charged by the Plaintiff for the postage of foreign letters, sixteen guineas of which sum were sworn to have been paid for the postage of foreign letters solely applicable to this cause.

(a) 2 *B. & P.* 330.

Both

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Both parties obtained rules *nisi* for the prothonotary to review his taxation. The Plaintiff, on the ground, among other objections, that the allowance ought to have been made on the whole declaration, when it appeared that the whole was, *bonâ fide*, framed with a view to trial, and witnesses attended in support of every part; that, at all events, costs ought to have been allowed for the expenses incurred in support of the allegation of special damage; that the rule in *Penson* v. *Lee*, which applied to different counts, had never been extended to different parts of the same count; that before a party paid a witness 500*l.*, he was entitled to know what the prothonotary would allow; and that the sum paid for postage of the foreign letters applicable to the cause ought to have been allowed.

One of the Defendant's objections, was, to the allowance for the time of the brokers who attended as witnesses, it being contended that such an allowance could only be made to medical men or solicitors, *Severn* v. *Olive* (*a*), *Willis* v. *Peckham* (*b*), *Moor* v. *Adam.* (*c*)

Cur. adv. vult.

And now the Court confirmed the rule in *Penson* v. *Lee*, and the prothonotary's taxation, as to the refusal to allow costs on any part of the proceedings but the bare count in trover, and the evidence thereon, and as to the refusal to allow for the witness who had not been paid. But they disallowed the sum taxed for the loss of time of the brokers, deciding that no allowance ought to be made for their loss of time; and, without laying down any general rule, directed that, in this case, the sum sworn to have been paid for the postage of foreign letters solely applicable to the cause, should be allowed.

Lens and *Hullock* Serjts. for the Plaintiff; *Vaughan* and *Bosanquet* Serjts. for the Defendant.

(*a*) *Ante*, iii. 72. (*b*) *Ante*, i. 515. (*c*) 5 *M.* & *S.* 156.

May 18.

Padfield v. Brine.

Under an execution by *A.* against *B.*, the Court will not order the sheriff to pay over money in his hands, levied on an execution by *B.* against *C.*

PADFIELD had recovered heavy damages in an action against *Brine*. *Brine* had recovered damages against *Hippisley*, and the sheriff had in his hands the sum of 533*l.* 8*s.* 5*d.*, being the proceeds obtained by the sheriff under the act of *fieri facias*, issued out of this court in the cause of *Brine* v. *Hippisley*.

A *fieri facias* having then been delivered to the sheriff in the cause of *Padfield* v. *Brine*,

Lens Serjt., on a former day, obtained a rule to shew cause why the sheriff should not be ordered to retain in his hands the sum above mentioned for the use of the Plaintiff, *Padfield*; and he cited *Armistead* v. *Philpot*. (*a*)

Pell Serjt., in shewing cause, said, that *Fieldhouse* v. *Croft* (*b*), and *Knight* v. *Criddle* (*c*), were direct authorities against such an application, and no answer being given to this, the rule was discharged, but without costs.

Rule discharged.

(*a*) *Doug.* 231. (*b*) 4 *East*, 510. (*c*) 9 *East*, 48.

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CHAMPION and Another *v.* TERRY. *May* 18.

Defendant being indebted to Plaintiff for goods sold, gave him a bill of exchange, not due, (drawn and accepted by two other persons,) to a greater amount than the price of the goods, and Plaintiff gave Defendant the difference in money. Defendant indorsed the bill in blank. Plaintiff having lost the bill before it was paid, Held, that he could not sue the Defendant for the price of the goods, or on the lost bill.

ACTION on a bill of exchange, and for goods sold and delivered. At the trial before *Dallas* C. J., it appeared that the Defendant, who had bought goods of the Plaintiff, when called on for payment, gave the Plaintiffs' agent a bill of exchange, drawn and accepted by two other persons, but not due, for an amount greater than the price of the goods; and that the agent, thereupon, gave the Defendant in money, the difference between the amount of the bill and the price of the goods: the Defendant indorsed the bill in blank.

The Plaintiff afterwards, and before the bill became due, transmitted it with several others in a letter which never reached its destination, and the bills were seen no more; whereupon, as soon as the time had elapsed, by which the bill in question would have become due, the Plaintiff brought this action. It did not appear that any enquiry had been made for the bill, or that there had been any advertisement of the loss. The jury found a verdict for the Defendant.

Vaughan Serjt., on a former day obtained a rule *nisi* for a new trial, or to enter a verdict for the Plaintiff, which he moved for, on the ground that the bill had not been received absolutely in payment and discharge of the Plaintiffs' demand, but only conditionally, provided the amount of it should actually come to hand.

Pell Serjt. now shewed cause. As to the count for goods sold, the Defendant, it must be presumed, gave value for this bill, the Plaintiff, therefore, who has put it out of the Defendant's power to recover that value

 again,

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CHAMPION *v.* TERRY.

again, shall not make him pay twice for the same goods. As to the count on the bill, the Plaintiff cannot recover unless he produces the bill, or proves that it has been lost; this was always the law with respect to actions against acceptors, and in *Powell* v. *Roach* (*a*), there is the same decision with respect to indorsers. No evidence was given in the present case of the absolute loss or destruction of the bill, and for aught that appeared at the trial the Plaintiff might be sued to morrow by a holder who had given value, and so, if cast in this action, pay for the same instrument three times.

Vaughan, in support of his rule, urged, that proof of the non-arrival of the bill within a reasonable time was sufficient proof of the loss of it, and he referred to *Long* v. *Bailie.* (*b*)

The Court seemed to think that there was no sufficient proof of the loss of the bill; but that, at all events, the Plaintiff having taken a bill, by losing which, he had deprived the Defendant of all means of recovering over, he should not turn round and sue the Defendant for goods which had already cost him their full value. They referred in the course of the argument to *Davis* v. *Dodd* (*c*), *Dangerfield* v. *Wilby* (*d*), and *Ex parte Greenway* (*e*), and observed that in *Long* v. *Bailie* the bill was specially indorsed.

Rule discharged. (*f*)

(*a*) 6 *Esp.* 76.
(*b*) 2 *Campb.* 214. *n.*
(*c*) 4 *Taunt.* 602.
(*d*) 4 *Esp.* 159.
(*e*) 6 *Ves. jun.* 812.

(*f*) See 2 *Campb.* 211. *et seq.* *Mayor* v. *Johnson*, 3 *Campb.* 324. *Poole* v. *Smith*, *Holt*, *N. P. C.* 144. *Mossop* v. *Eadon*, 16 *Ves. jun.* 430. See also *Williamson* v. *Clements*, 1 *Taunt.* 523.

1822.

IN THE EXCHEQUER CHAMBER.

CLEMENT *v.* LEWIS, Gent. (in Error).

May 18.

Where an account of certain proceedings in a court of law was headed in a newspaper, "Shameful conduct of an attorney," Pleas to a declaration in libel, that the alleged libel contained a faithful and true account of proceedings in a court of law, were held ill.

The jury having found for the Defendant on six out of eight pleas comprehended in the last of two issues, and for the Plaintiff on the residue of those pleas, and on the first issue without assessing damages; and the Plaintiff having, pursuant to the decision of the Court of K. B., entered up as to the pleas found for the Defendant, judgment *non obstante veredicto*, with an award of a writ of inquiry, and final judgment for the damages found by the inquisition, &c.: a court of error reversed the judgment of the Court of K. B., as to the award of the writ of inquiry, and the final judgment thereon — remitted the record to the Court of K. B. — and directed that court to award a *venire de novo* to try the first issue and the last, as far as related to the pleas on which the finding was for the Plaintiff; holding, that the verdict found for the Plaintiff on the first issue, and on the last, (as far as regarded the pleas on which the finding was for the Plaintiff,) was void, because no damages had been assessed.

LEWIS sued *Clement* in the King's Bench, for a libel in *The Observer* newspaper, headed "Shameful Conduct of an Attorney." Pleas, first, General issue, and issue thereon; and then eight special pleas, justifying on the ground, that the alleged libel contained a faithful and true account of the several proceedings therein stated, had in the Insolvent Debtors' Court, and issue on those pleas. The jury, at the trial, found a verdict for the Plaintiff on the first issue, and on the last as far as related to the second and sixth pleas, without assessing damages; and for the Defendant on the last issue as far as it related to the third, fourth, fifth, seventh, and eighth pleas. The Court of King's Bench, on a motion to enter up judgment for the Plaintiff, *non obstante veredicto*, decided that the pleas were ill, because the words at the head of the libel formed no part of the proceedings in the Insolvent Debtors' Court, — gave

judgment

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judgment for the Plaintiff (*a*), — awarded a writ of enquiry to assess the damages, and judgment was thereon entered up for 500*l.* damages and 40*s.* costs, (the sum assessed), and 656*l.* for costs of encrease.

The Defendant brought a writ of error in *Cam. Scacch.*, and assigned for errors, that judgment was entered up *non obstante veredicto;* and common error.

Joinder in error.

Platt, for the Plaintiff in error, contended, that the heading of the libel imputed no misconduct beyond that which was developed in the ensuing statement; and that the finding of the jury had in effect thrown the heading out of the account.

But on this point the Court affirmed the judgment of the Court below.

Platt then objected that the verdict was void, because the jury had not assessed damages on the issues found for the Plaintiff, that the Court below ought therefore to have awarded a *venire de novo* instead of a writ of inquiry, the rule being, that when the court *ex officio* ought to inquire of any thing upon which no attaint lies; there the omission may be supplied by a writ of inquiry; but in all cases, when any point is omitted whereof attaint lies, it shall not be supplied by a writ of inquiry of damages, but by a *venire de novo;* that attaint would have lain against the original jury in the present case, of the benefit of which the Defendant would be deprived if he were concluded by the finding of an inquisition on which no attaint lies; he cited *Comyns' Dig.* tit. *Damages*, E, *Cheyney's* case, 3d *Resolution* (*b*),

(*a*) See 3 *B.* & *A.* 702. *et seq.* (*b*) 10 *Rep.* 119. *a.*

Heydon's

Heydon's case (*a*), *Eichorn* v. *Le 'maitre* (*b*), and *Kirk* v. *Nowill.* (*c*)

Marryatt, for the Defendant in error. It may be true, that where the first jury omits something which it ought to have found, the Court cannot *ex officio* ascertain by a writ of inquiry what has been omitted. In all the cases cited, the verdict having passed for the Plaintiff, the jury omitted something which they might and ought to have found; but neither those cases, nor the principle just laid down, are applicable to the present case, where the verdict having passed for the Defendant on an issue going to the whole declaration, the jury had no power to find damages for the Plaintiff; and therefore, have omitted nothing.

[*Per Curiam*, they may find for a Defendant on special pleas, and damages for the Plaintiff under the general issue. *Sayre* v. *Earl of Rochford* (*d*), *Kirk* v. *Nowill* and this is not unusual.]

Then, the reason for not awarding a writ of inquiry, namely, that the Defendant may thereby be deprived of his attaint, can scarcely be urged with effect at this day, when the writ of attaint has been obsolete for nearly two centuries. However, if it were otherwise, a writ of attaint would not have lain in this case, for the jury could only have erred in the amount of the damages, and for excess or insufficiency of damages, a writ of attaint does not lie. *Barker* v. *Sir Wolston Dixie.* (*e*) Where there is a verdict on an immaterial issue, or on an issue ill joined after a justification, the Court will award a new writ to inquire of damages, *Lacy* v. *Reynolds* (*f*), 2 *Roll. Abr.* 99. *D.*

(*a*) 11 *Rep.* 6. *a.*
(*b*) 2 *Wils.* 367.
(*c*) 1 *T. R.* 118. 266.
(*d*) 2 *W. Bl.* 1165.
(*e*) 2 *Str.* 1051.
(*f*) *Cro. El.* 214.

Jones

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Jones v. *Bodinham* (*a*), *Staple* v. *Haydon* (*b*), *Broome* v. *Rice* (*c*), *Broadbent* v. *Wilks* (*d*), *Darrose* v. *Newbott* (*e*), *Knight* v. *Lillo* (*f*), *Craven* v. *Hanley* (*g*), *Lucena* v. *Craufurd* (*h*), 2 *Roll. Abr.* 722., were also referred to for the purpose of shewing that the Court had been in the habit of awarding writs of inquiry in cases similar to the present; but they were distinguished by the Court, or shewn not to apply.

The following judgment was entered up by order of the Court.

It appears, that notwithstanding the verdict found for the Defendant, still the Plaintiff ought to recover damages.

But it farther appears to the Court, that the jury by whom the issues were tried, ought to have assessed the Plaintiff's damages, by reason of the grievances contained in the declaration; and by reason of their not having assessed such damages, the verdict for the Plaintiff on the first and last issues, so far as relates to the second and sixth pleas, is void in law,

It further appears, that in the record and proceedings, &c., there is error, in this, that the Court of King's Bench have awarded a writ of inquiry, and proceeded to final judgment thereupon; therefore it is considered that the verdict and the inquisition of damages be annulled and vacated, and the final judgment in the King's Bench be reversed, — that the record be remitted to the Court of King's Bench, — and that the same Court do anew command the sheriff to cause a jury to come, &c., to try the first issue and the said other issue, so far as relates to the second and sixth pleas.

(*a*) 1 *Salk.* 173. *Carthew*, 370. *S. C.*
(*b*) *Ibid.*
(*c*) 2 *Str.* 873.
(*d*) *Willes*, 364.
(*e*) *Cro. Car.* 143.
(*f*) 2 *Wils.* 81.
(*g*) 2 *Com. Rep.* 548.
(*h*) 2 *N. R.* 329.

1822.

MORRIS *v.* MAGRATH.

May 20.

Plaintiff having omitted three terms after judgment to charge in custody Defendant, who, after judgment, had surrendered in discharge of his bail: Held, that Defendant was supersedable, although, in the mean time, he had removed himself into another custody by *habeas corpus* in another action.

IN this case judgment was signed in *Easter* term, 1821. On the 3d of *July* following, the Defendant surrendered in discharge of his bail, when no further proceedings were had in the cause till *Hilary* term, 1822; the Plaintiff then (the Defendant having previously removed himself by *habeas corpus* in another cause, into the prison of the King's Bench) issued a *habeas corpus*, and on the 12th of *February* charged the Defendant in execution.

Lawes Serjt. obtained a rule *nisi* for a writ of *supersedeas* to discharge the Defendant out of custody, on the ground that he ought to have been charged before the end of *Michaelmas* term. *Heaton* v. *Wittaker* (*a*), *Line* v. *Lowe.* (*b*)

Vaughan Serjt., who shewed cause against the rule, contended, that the Defendant ought to have applied sooner, and that the rule that a party who was once supersedable was always supersedable, was confined to cases where the party remained in the same custody and under the same process, *Rose* v. *Christfield* (*c*); here he had removed himself by *habeas corpus* in another action.

Lawes, in support of his rule, argued, that the Defendant having surrendered in discharge of his bail, after judgment, must be deemed to be still in custody

(*a*) 4 *East*, 349. (*b*) 7 *East*, 330. (*c*) 1 *T. R.* 591.

under

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under the same process, although he was also in custody under another action; and

The Court being of this opinion, the rule was made

Absolute.

May 20.

CALDER v. RUTHERFORD and Others.

In an action on an agreement to pay 100*l.* if Plaintiff would not send herrings for one twelvemonth to the *London* market, and, in particular, to the house of *J.* and *A. M.* The Plaintiff proved he had sent no herrings during the twelvemonth to the house of *J.* and *A. M.*: Held, sufficient to entitle him to recover, no proof being given that he had sent herrings within that time to the *London* market.

Where *A.*, partner with *B.*, signed an agreement on behalf of the house of *A.* and *B.*, and *B.* survived *A.*: Held, that an action on the agreement lay against the executors of the survivor only.

ACTION against the executors of *James Stuart*, the survivor of two partners, on the breach of an agreement, signed by *Gabriel*, for the house of *James* and *Gabriel Stuart*, to pay 100*l.* if the Plaintiff would not consign, for one year, directly or indirectly, any quantity of repacked herrings to the *London* market, made up for the *West India* market; and, in particular, to the house of Messrs. *J.* and *A. Millar*.

At the trial before *Dallas* C. J., *London* sittings after *Hilary* term last, the Plaintiff proved that he did not consign, for the space of one year from the date of the agreement, any repacked herrings to the house of *J.* and *A. Millar*. For the Defendant it was objected, that the Plaintiff's proof was insufficient, and that he should have called his clerk to shew that no herrings were consigned to the *London* market generally.

A verdict was found for the Plaintiff, with liberty for the Defendant to move to set it aside, and enter a nonsuit.

Vaughan Serjt. accordingly having obtained a rule *nisi* on the above objection, and also on another, *viz.*

that

that the action ought to have been brought against the executors of both the partners, and not singly against the executors of the survivor,

Taddy Serjt., in opposing the rule, urged that the Plaintiff had made out a sufficient *primâ facie* case by adducing some evidence that applied to the terms of the agreement, namely, by shewing that he had sent no herrings to *J.* and *A. Millar*; that, after this, he could not proceed further in the proof of a negative, but that the Defendant should, if he could, have proved the affirmative of the issue; and that a party could only be called on to prove a negative to its full extent where the omission of the act required to be done, would be a criminal neglect of duty. *Williams* v. *East India Company.* (a) As to the objection respecting the non-joinder of the executor of the other party, *Richards* v. *Heather* (b), was an express authority to shew that the action was well brought against the executors of the survivor.

Vaughan in support of his rule. The doctrine laid down in *Williams* v. *East India Company* is not confined to negative averments imputatory of criminal neglect of duty; but where there is a negative averment, the issue shall be proved by the party who can prove it with the least inconvenience; as the Plaintiff might have done here by calling his own clerk.

DALLAS C. J. It is not necessary for us to lay down any rule, or draw any distinction in this case, as to negative or affirmative averments. Generally speaking, the rule is, that the affirmative of the issue must be proved, and the case of *Williams* v. *East India Company* is an exception. But here some evidence was given

(a) 3 *East*, 192. (b) 1 *B. & A.* 29.

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given in proof of the negative averment, and that threw it on the other party to go further.

PARK J. 'The evidence given by the Plaintiff, though vague, was enough to throw it on the other party to go further. On both points, I agree with my brother *Taddy*.

The rest of the Court concurring, the rule was

Discharged.

May 20.

PAYNE *v.* BAILEY.

Plaintiff obtained a verdict subject to the award of an arbitrator. The arbitrator having made a material mistake in his award, and the Defendant having refused to refer matters back, this Court set aside the verdict, and discharged the rule for reference. The Plaintiff took the cause down to trial a second time, and a second time obtained a verdict: Held, that he was entitled to the costs of both trials.

THIS was an action brought against the Defendant, as surety on the joint and several bond of the Defendant, and *Richard Lough*, the principal, and *John Selby*, the other surety, which was dated the 27th *February*, 1819, and was taken in the penal sum of 4000*l*., for securing the payment of the three several acceptances of the said *Richard Lough*, therein mentioned, being the capital sum due to the Plaintiff from the said *Richard Lough*, on the dissolution of a copartnership, one of which acceptances, for the sum of 766*l*. 9*s*. 1*d*., was payable two months from the date of the said bond, and this action was brought to enforce the payment of the said instalment, the others not being then due.

The Defendant pleaded, first, the general issue; secondly, that the bond was obtained by fraud, covin, and misrepresentation by the Plaintiff, and certain other persons in collusion with the Plaintiff; and, lastly, that

the

the bond was obtained by fraud, covin and misrepresentation; upon which several pleas issues were joined. 1822.

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The cause came on for trial at *Guildhall*, *London*, before *Dallas* C. J. and a special jury (obtained at the Defendant's instance) on the 2d *July*, 1819, when, after the Defendant's case had been partly gone into, a general reference to a barrister was suggested, which was acceded to by the counsel for the Plaintiff and Defendant, and it was thereupon ordered by the Court, with the consent of all parties, that a verdict should be entered for the Plaintiff, for 4000*l.* debt, and 1*s.* damages, subject to the award of a barrister, to whom all matters in difference between the parties were referred, and it was also ordered, that the costs of the suit, to be taxed, should abide the event of the award, and that the costs of the reference and award, and of the special jury to be taxed, should be in the discretion of the arbitrator.

The reference was proceeded in, and the Plaintiff, in addition to the sum of 766*l.* 9*s.* 1*d.*, for which this action was brought, claimed before the arbitrator the remaining instalments on the bond, amounting together to the sum of 2337*l.*, exclusive of interest thereon, under or by virtue of the principal bond, together with the sum of 122*l.* under and by virtue of another bond, entered into by the Defendant and the said two other persons, to indemnify the Plaintiff against sundry copartnership debts which were to be paid by *Richard Lough*, the Plaintiff having been called upon to pay, and having paid that sum, one moiety of which, being 61*l.*, the Plaintiff claimed from the Defendant as one of the sureties under the bond of indemnity, in addition to one moiety of the principal and interest under the principal bond before mentioned, the liability of each surety on both the bonds being limited to one moiety of the amount of the sums thereby respectively secured.

 The

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found. *Worcestershire Canal Company* v. *The Trent Navigation Company* (a), *Lickbarrow* v. *Mason* (b), *Smith* v. *Haile* (c), *Hankey* v. *Smith* (d), *Bird* v. *Appleton.* (e)

Hullock in support of his rule. In *Worcestershire Canal Company* v. *The Trent Navigation Company*, both parties were in default, because, if either had been attentive, a proper verdict might have been procured. Here the second proceeding was rendered necessary by the perverseness of the Defendant.

Cur. adv. vult.

And now, *The Court* took the same view of the matter; and looking to the peculiar circumstances of this case, without impeaching the rule which had been laid down in others, or laying down any rule for the future, intimated that the prothonotary should allow the costs of the first trial.

Rule absolute.

(a) 2 *Marsh.* 475.
(b) 6 *T. R.* 131.
(c) 6 *T. R.* 71.
(d) 3 *T. R.* 507.
(e) 1 *East*, 111.

JOSEPH DUNN *v.* WILLIAM CRUMP.

May 20.

WRIT of false judgment from the county court of *Worcester*. The declaration stated in the first count, that, whereas the Defendant on, &c., "at *Eckington*, in the county of *Worcester*, and *within the jurisdiction of that Court*, was indebted to the Plaintiff in 39*s*. of lawful money of *Great Britain*, for the work and labour, care and diligence of the said Plaintiff, by him before that time, and *within the jurisdiction of that Court*, done, performed, and bestowed at the special instance and request of the said Defendant, in and about the healing and curing of divers mares and geldings of the said Defendant of divers diseases, disorders, and maladies under which they before then had respectively laboured and languished, and in and about the endeavouring to heal and cure divers other horses, mares, and geldings of the said Defendant, of divers other diseases, &c. under which they had before then respectively laboured and languished, and for divers potions, draughts, ointments, medicines, and other necessaries used, administered, and applied *on those occasions* by the said Plaintiff, at the like request of the said Defendant, and being so indebted, he, the Plaintiff in consideration thereof, afterwards, to wit, on, &c. at, &c. and *within the jurisdiction of that Court*, took upon himself, and then and there faithfully promised, &c. to pay the same whenever, &c." In the last count of the declaration, a charge for potions, &c. was

1. *Assumpsit* for work and labour in healing horses *within the jurisdiction* of a county court, and for potions, &c. administered *on those occasions*: Held, that this amounted to a sufficient allegation that the potions were administered within the jurisdiction of the county court.

2. A mere miscalculation will not avoid a judgment; therefore, where a jury assessed damages at 1*l*. 8*s*. 6*d*. besides costs, and the costs at 12*d*., and judgment was entered up, "that the Plaintiff do recover against the Defendant his damages, costs, and charges, in form aforesaid, assessed by the said jury at 1*l*. 8*s*. 6*d*., and also 7*l*. 9*s*. 10*d*. for his costs and charges aforesaid by the said court here adjudged of increase to the Plaintiff, and with his assent, which said damages, in the whole, amount to 8*l*. 18*s*. 4*d*.; and the said Defendant, in mercy, &c.," it was held sufficient.

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laid in the same manner as the first. The jury found a verdict for the Plaintiff, and assessed the damages at 1*l.* 8*s.* 6*d.* besides costs, and the costs at 12*d.*

The judgment was, "that the said *Joseph Dunn* do recover against the said *William Crump*, his damages, costs, and charges in form aforesaid assessed by the said jury at 1*l.* 8*s.* 6*d.*, and also 7*l.* 9*s.* 10*d.* for his costs and charges aforesaid, by the said Court here adjudged of increase to the said *Joseph Dunn*, and with his assent, which said damages in the whole amount to 8*l.* 18*s.* 4*d.*, and the said *William Crump* in mercy, &c."

Assignment of false judgment in this, viz. that it is not stated or alleged, nor does it appear in and by the first and last counts of the said declaration, that the potions, &c. in those counts mentioned, were used or applied by the Plaintiff on the occasions therein mentioned, within the jurisdiction of the county court aforesaid; and also in this, that the consideration for the promises, &c. in the declaration mentioned, does not appear, nor is stated in the declaration to have arisen or happened within the jurisdiction of the said Court, and also, &c.

Joinder.

Lawes Serjt., for the Defendant, contended, 1st, that the whole of the consideration did not appear to have arisen within the jurisdiction of the inferior court, the declaration omitting to state that the potions had been administered within the jurisdiction; he cited 1 *Wms. Saunders*, 74. note 1. to *Peacock* v. *Bell*, and *Waldock* v. *Cooper*. (*a*)

2dly, That the judgment ought to have been for 1*l.* 9*s.* 6*d.* (the sum given by the jury) with costs of increase, instead of 1*l.* 8*s.* 6*d.* To shew that a defendant

(*a*) 2 *Wils.* 16.

might

might object to an erroneous judgment, though in his own favour, he cited 2 *Roll. Abr.* 759. tit. *Error* (Y) *Becher's* case (*a*), *Heines* v. *Guie* (*b*) and *Bac. Abr.* *Error*, *K.* 4.

And to shew that the judgment below being against the Defendant, the Court could only reverse it, and not give a right judgment, as they might if the judgment below had been against the Plaintiff, he cited *Bac. Abr.* *Error*, *M.* 2., and he urged, that if the Court took on themselves to amend this judgment, the statutes of *Jeofails* would be rendered unnecessary.

Peake Serjt., for the Plaintiff, cited the dictum of *Buller* J. in *Gamon* v. *Jones* (*c*), that "it is an invariable rule, that, if a judgment be more favourable for the Plaintiff than he is entitled to, he cannot take advantage of it, because he is not injured by it." He also cited 1 *Roll. Abr.* 205. *Amendment F. pl.* 5. 1 *Salk.* 401. *Judgment*, 8., and *Cro. Eliz.* 806. (*d*), and *Richardson* J. referred to *Showers' Quære* at the end of *Anger* v. *Brookhen.* (*e*)

Lawes in reply. It does not appear in the case in 1 *Roll. Abr.* 205. that the amendment was not made by the Court below, the propriety of which is not disputed; and the authority in *Salk.* 401. only says, the Court of Error may amend if the record will warrant it, which cannot be affirmed of the present case.

Cur. adv. vult.

And now the judgment of the Court was delivered by

(*a*) 8 *Rep.* 58.
(*b*) 10 *Vin. Abr.* p. 61. tit. *Error*, (I *c.* 12.) *pl.* 3. *Yelv.* 107.
(*c*) 4 *T. R.* 509.
(*d*) *Williams* v. *White.*
(*e*) 2 *Show.* 89.

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DALLAS C. J. The first error assigned is, that the whole of the consideration for the promises is not alleged to have accrued within the jurisdiction; but it is alleged that the work and labour done by the Plaintiff, in curing and endeavouring to cure the Defendant's horses, was done within the jurisdiction; and it is further alleged, that the ointments and medicines which were used were administered and applied *on those occasions*; which we think sufficiently shews that they must have been administered and applied there.

The second error insisted on is, that whereas the jury have assessed the Plaintiff's damages, besides his costs and charges, at 1*l.* 8*s.* 6*d.*, and those costs and charges at 12*d.*, the Court, in giving judgment, have omitted the costs assessed by the jury, and yet have awarded costs of increase, there being nothing to which those costs of increase can attach themselves, and then have summed up together the damages and costs of increase, still omitting the costs assessed by the jury; which, it is contended, vitiates the whole judgment. In support of this objection, *Heines* v. *Guie* (*a*) was cited, where the jury gave 8*l.* damages and 2*d.* costs, and the judgment was *Ideo considerat' est quod the Plaintiff recuperet damna sua per jurat' prædict' assessa in formâ prædictâ ad 8l. necnon 20s. pro misis et custag' de increment' Curiæ*; and adjudged error, because the costs given by the jury were omitted.

Anger v. *Brookhen*, as reported in 2 *Show.* 56. 88., is to the same effect, where the jury, on a writ of enquiry, assessed damages 100*l.* and 6*d.* costs, and the judgment was, *quod prædict' querens recuperet damna sua prædict' ad cent' libras per inquisition' prædict' compert' et pro increment' 7l.* And the Court unwillingly held this to be error, because the jury had given particulars, viz. so much

(*a*) *Yelv.* 107.

for

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for damages and so much for costs, and the judgment was for the damages only; which they thought was not a mere miscalculation, but a total omission of the costs found by the jury. It seems that, if they could have considered it as a mere miscalculation, they would have disregarded the objection.

And there are cases which would have warranted them in so doing. "In an action upon the case upon a promise, if judgment be given for the Plaintiff upon demurrer, and a writ of damages awarded, and thereupon damages taxed to 35*l.*; and upon this judgment is given *quod querens recuperet damna præd' ad* 37*l. per juratores præd' assessa*, yet this judgment is not erroneous, because the judgment is perfect by the first words, *quod recuperet damna prædicta*, without more; and, therefore, the summoning (*a*) thereof afterwards is but surplusage; and, therefore, this being mistaken, it does not vitiate the judgment." *Guier* v. *Goter*. (*b*) "In an action upon the case upon a promise, and verdict for the Plaintiffs (*c*), and damages and costs given, and the judgment is *quod querens recuperet damna sua ad* 6*l. per juratores prædictos in forma prædicta assessa*, and the damages and costs are mistaken, not amounting to so much; yet this is not erroneous, for this is only a miscasting, and *damna præd'* intends only those which were assessed, and so the judgment is not for more." *Morecock* v. *Hooles*. (*d*) Here the judgment is, "that the said *Joseph Dunn* do recover against the said *William Crump* his damages, costs, and charges in form aforesaid assessed by the said jury at 7*l.* 8*s.* 6*d.*, and also 7*l.* 9*s.* 10*d.* for his costs and charges aforesaid, by the said Court here adjudged of increase to the said *Joseph Dunn*, and with his assent, which said damages in the

(*a*) *Sic in loc. cit.*
(*b*) *Vin. Abr. Error, Bb. pl.* 13.
(*c*) *Sic in loc. cit.*
(*d*) *Vin. Abr. Error, Bb. pl.* 34.

whole

1822.
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whole amount to 8*l.* 18*s.* 4*d.*," which expressly adjudges the costs and charges, as well as the damages given by the jury, but miscalculates the amount. The judgment is complete, for the damages, costs, and charges assessed by the jury, without the words "at 1*l.* 8*s.* 6*d.*," which being a mere miscalculation and unnecessary, may be rejected as surplusage. The additional words, "which said damages in the whole amount to 8*l.* 18*s.* 4*d.*" contain another miscalculation; but this will not vitiate the previous judgment, which was before complete, as well for the damages, costs, and charges assessed by the jury, as for the costs of increase.

Judgment affirmed.

END OF EASTER TERM.

AN

INDEX

TO THE

PRINCIPAL MATTERS

CONTAINED IN THIS VOLUME.

Court

BILL OF EXCHANGE.

See EVIDENCE, 5. FORGERY, 1.

Defendant being indebted to Plaintiff for goods sold, gave him a bill of exchange, not due, (drawn and accepted by two other persons) to a greater amount than the price of the goods, and Plaintiff gave Defendant the difference in money. Defendant indorsed the bill in blank. Plaintiff having lost the bill before it was paid, Held, that he could not sue the Defendant for the price of the goods, or on the lost bill. *Champion* v. *Terry*. *Page* 294

BROKER.

See COSTS, 9.

CARRIER.

And see PLEADING, 2.

Plaintiffs having received an order from a stranger to furnish *J. Parker*, of *High-street*, *Oxford*, with goods, and finding upon enquiry that Mr. *Parker* of the *High-street* was a tradesman of respectability, forwarded the goods by a carrier, having directed them to *J. Parker*, *High-street*, *Oxford*. On the arrival of the parcel at *Oxford*, the carrier's porter there, who knew *W. Parker* of the *High-street*, (and who was accustomed to deliver parcels at the houses of the consignees,) told him of the arrival of the parcel, no other *Parker* residing in that street. *W. P.* said he expected no parcel. A person to whom the porter had before delivered parcels under the name of *Parker*, called at the Defendant's office shortly afterwards, and saying the parcel was his, was allowed to take it on paying the carriage, there being many persons of that name at *Oxford*. The Plaintiffs having thus lost their goods, desired the Defendant, by letter, to apprehend the person who had taken them, if he again presented himself, and afterwards said, that they had done with the Defendant, if the man who had the parcel were produced. A notice was suspended in a conspicuous part of the Defendant's office, limiting his responsibility to *5l.*, except where articles were entered according to their value; and the parcel in question had not been so entered, though worth 89*l.*; but the Plaintiffs' porter swore he never saw the notice. The Plaintiffs having sued the carrier, and the Judge having directed the jury that the carrier's negligence had been such as to render it unnecessary to consider the question as to the notice touching the limited responsibility, and a verdict having been found for the Plaintiffs,

The Court refused to grant a new trial, which was moved for on the ground that the question touching the notice ought to have been considered; that the judge ought to have pointed the attention of the jury to the Plaintiffs' letter,

for loss of time, unless they be medical men. *Severn* v. *Olive*. *Page* 72

4. Two actions against one insurance company, and two against another, on the same loss, were at issue in *Hilary* term, 1820: the second, third, and fourth were set down for trial, at the sittings after that term, but not the first, upon two of the pleas in which there were demurrers. The second cause was tried at those sittings, and a verdict was found for the Plaintiff. A rule *nisi* for a new trial in this cause was obtained in *Easter* term; but was suspended from time to time, till one of the other causes should also have been tried, and the result of certain proposed experiments touching the point in dispute be made known. At the sittings after *Michaelmas* term, 1820, the first, third, and fourth causes were set down for trial; and the third, which then stood first in the paper, was tried, on which a verdict was found for the Plaintiff: Held, that the costs were rightly apportioned by the prothonotary, half to be paid by one company and half by the other. *Ibid.*

5. Trespass in some named and some unnamed closes of the Plaintiff, and also for taking his goods and chattels. Pleas: 1st, not guilty, to the whole declaration; 2dly, as to part, a special plea of license; 3dly and 4thly, as to part, certain special pleas, on which the jury were, by consent, discharged from giving any verdict; 5thly, as to the unnamed closes, *lib. ten.* The replication took issue on the plea of not guilty, traversed the licence mentioned in the 2d plea, and also new assigned on that plea; and, as to the unnamed closes, contained a *nolle prosequi*. The rejoinder took issue on the traverse, judgment was suffered by default on the new assignment, and the cause went down to trial, as well to try the issues joined, as to assess the Plaintiff's damages on the new assignment. The jury found for the Plaintiff on the general issue (without any damages); for the Defendant, on the plea of licence; and assessed to the Plaintiff on the new assignment, 1*s.* damages and 1*s.* costs: Held, that the Plaintiff was entitled to the general costs of the cause, including those of the trial, the costs of the issue found for the Defendant being deducted, but no costs being allowed to the Defendant on that issue. *House* v. *The Commissioners of the Thames.* 117

6. Plaintiff, an attorney, sued for 21*l.* 7*s.* 11*d.* Defendant, previously to the delivery of declaration, took out a summons to stay proceedings, on payment of 15*l.* and the costs then incurred. Plaintiff refusing to accept the 15*l.*, proceeded by delivering a declaration, but afterwards took the 15*l.* in full satisfaction of his demand, and taxed his costs. The debt having been due to the Plaintiff for five years, and the Defendant having frequently promised to pay it, the Court refused to order the costs to be re-taxed, so as to allow the Defendant

fendant the costs incurred between the summons to stay proceedings and the taking of the money out of court. *Carr* v. *Smythies*. *P*. 168

7. The Defendant, on being arrested, paid, under 43 *G*. 3. *c*. 46., the debt, and 10*l*. for costs, (which 10*l*. was more than sufficient to cover the costs,) and informed the Plaintiff's attorney that he should reclaim only the surplus which might remain after payment of debt and costs; the Plaintiff's attorney, on the sheriff's omitting, after request, to remit the money, proceeded in the action, and incurred further costs: Held, that the Defendant was not liable to pay the costs so incurred after the arrest. *Clarke* v. *Yeates*. 273

8. In an action on the case against an agent for misfeasance, the declaration, in addition to the counts on the misfeasance, contained two counts in trover, with an allegation of special damage. The Plaintiff failed in substantiating the counts for misfeasance, or the allegations of special damage, but recovered on the bare count in trover: Held, that he was entitled only to the costs of, and occasioned by that count, divested of the special damage allegation; and that he was entitled to the sum sworn to have been paid for the postage of foreign letters solely applicable to the cause. *Lopes* v. *De Tastet*. 292

9. No costs are allowed for the loss of a broker's time. *Ibid*.

10. No costs are allowed for a witness who has not been paid before the claim is made. *Ibid*.

11. The Plaintiff obtained a verdict, subject to the award of an arbitrator. The arbitator having made a material mistake in his award, and the Defendant having refused to refer matters back, the Court of C. P. set aside the verdict, and discharged the rule for reference. The Plaintiff took the cause down to trial a second time, and, a second time obtained a verdict: Held, that he was entitled to the costs of both trials. *Payne* v. *Bailey*. Page 304

COUNTY COURT.

See PLEADING, 3.

CROWN DEBT.

See SHERIFF, 1.

DAMAGES.

See JUDGMENT *and* WRIT OF INQUIRY.

DEBT.

See ANNUITY, 1.

DEEDS.

See EVIDENCE, 4. STAMP, 1.

By a deed of feoffment of 1621, Sir *N. S.* (in consideration of 100*l*. paid by the feoffees and the other inhabitants of *Enfield*, and of a free-school for ever, to be held for the instruction of the children of inhabitants of *Enfield*,) granted certain lands to fourteen feoffees, to the intent that they and their heirs should pay 20*l*. a-year out of the rents towards the maintenance of a

schoolmaster for such school, and the residue for other purposes, provided that no act concerning the lands or their rents should be done, but in a vestry, or meeting of the feoffees, and ten at least of the inhabitants of *Enfield*, which should be vestry-men, and not feoffees, in a vestry to be held by them in a chamber over the school, or in the vestry, situate in the parish church, upon public warning, to be given in the church the *Sunday* before the meeting. Schoolmasters were to be elected in this way within three months after every vacancy, and were to give a bond to three feoffees to resign the appointment upon half-a-year's warning by the feoffees, or any of them, so it were with the consent and agreement of the feoffees and vestry-men, or the most part of them, which should be assembled in a vestry or meeting, to be held as aforesaid,, so always as at least ten of the vestry-men which were not feoffees should vote at the holding of the vestry. Two feoffees were to receive the rents, and account for them the *Sunday* after the receipt, at a vestry, consisting of the persons before described, and held and convened in the mode before mentioned. When the feoffees should be all dead but five, four, or three, at the least, or gone to live out of the parish, the survivors were to enfeoff fourteen others, of discreet and wealthy men, then inhabitants in the parish, to be chosen by the vestry-men of the parish, or the greater number at a vestry, to be holden in the manner before described: Held that, in the execution of the power of removal of the schoolmaster, the votes were to be taken *per capita*, and not according to the provisons of 58 *G*.3. *c*. 59. *Attorney-General* v. *Wilkinson* Page 266

DEVISE.

And see ADVOWSON.

1. Devise. "As for my *temporal* estate and effects, I give and dispose of the same in manner following: I *give and bequeath* to *L. C.* 4*l*.; I give and bequeath to *M. H.* 3*l*.; I give, *devise*, and bequeath to *J. G.* all my lands, tenements, and hereditaments, with their appurtenances, particularly those called *B.* and *C.*; and all the rest and residue of my goods and chattels, personal and *testamentary effects* whatsoever, I *give and bequeath* to the said *J. G.*, whom I make sole executor of this my will:" Held, that *J. G.* took a fee in the lands *B.* and *C.* *Doe dem. Penwarden* v. *Gilbert*. 85

2. Bequest of personalty to testator's sister and nephew during their joint lives, share and share alike, and to the survivor for life, *in case there should happen to be no issue living of them, or either of them; but in case both, or either, should leave any issue*, to the survivor of the said sister or nephew one moiety of the personalty for his or her life, the other moiety, or such part of the same as should be thought needful by the executor of the party dying and leaving issue,

to

to be applied to the maintenance and education of all and every the child and children of the party so dying, during the respective minorities of such child or children; and after the death of the survivor of the said sister and nephew, the survivor's moiety in the personalty, or such part thereof as should be thought necessary by the executor of such survivor, to be applied to the maintenance and education of all and every the child and children of such survivor, during their respective minorities, and *when and as* such several children of the said sister and nephew (if there should be any) should respectively attain their age of 21, the whole of the said personalty unto and equally amongst all of them, share and share alike; and if but one, then to such only child: the persons who eventually should have the payment of the shares to have due regard to the expenditure of the children during their minorities, in order to the division of the property being made as equal as possible. But if the nephew only should have issue living at the time of the death of survivor of sister and nephew, the property was to be divided among all his children, in such shares as he by will should appoint; and in default of such will, equally among all such children. If the sister and nephew should both die without leaving issue, the property was given to such person or persons, in such shares as the survivor of sister and nephew should by will appoint; and in default thereof, to testator's personal representatives.

Then followed a devise of real estate to the sister and nephew for their joint lives, and to the survivor for his or her life, *in case there should be no issue living of them, or either of them; but in case both, or either of them, should leave any issue*, then to the survivor of the sister and nephew one undivided moiety of the real estate for his or her life; the rents and profits of the other undivided moiety to be applied to all and every the child and children of either of them (the sister and nephew) so dying, during their several minorities, if there should be occasion for it, in like manner as was directed regarding the personal estate; and after the death of the survivor of the sister and nephew, the remaining moiety of the rents and profits of the real estate was to be applied in like manner, if there should be occasion, to all and every the child and children of such survivor, during their several minorities; and *when and as* such several children of the sister and nephew (if any such there should be) should respectively attain their age of 21, the whole of the real estate was given unto and equally amongst all such children, share and share alike, if more than one, as tenants in common, and to their respective heirs and assigns, for ever; and in case the sister and nephew should both die without leaving, or, there

being issue, they should die under 21 without issue, the real estate was given to *G. M.*:

Held, that under this will, a child of the nephew, the only issue of nephew or niece alive at the death of the devisor, took, at the death of the devisor, a vested estate in fee simple in remainder in the devisor's real property, subject to be divested in part by the birth of other children of the nephew or niece, or either of them, and determinable altogether in the event of such child dying in the lifetime of the nephew, or under age without issue. *Machin* v. *Reynolds*. *Page* 121

3. *A.* on the marriage of his daughter *C.*, conveyed property to the use of himself for life; remainder to the use of *B.*, his daughter's intended husband, for life; remainder to the use of *C.* for life; remainder to the use of the sons of the marriage successively in tail; remainder to the use of the daughters of the marriage as tenants in common in tail; reversion to the use of *A.* *A.* afterwards, on his death, devised all his property, not before settled, to the use of his widow for life; remainder to the use of *B.* for life; remainder to the use of *C.* for life; remainder to the use of their sons successively in tail, (subject to a term for the provision of younger children;) remainder to the use of the daughters as tenants in common in tail; remainder to the use of *C.* and her heirs. *B.* and *C.* afterwards levied a fine of all the before-mentioned premises to the use (subject to the uses in the settlement and will mentioned), of such person as *C.*, by will in writing, or any writing of appointment purporting such will to be by her signed, in the presence of, and attested by three or more witnesses, should appoint; (which will, or writing of appointment in nature of a will, *C.*, notwithstanding her coverture, was thereby empowered to make,) and, in the mean time, and for want of such appointment for the whole or any part, to the use of *C.* and her heirs. *C.* having survived *B.*, by whom she had no issue, married *D.*, whom she also survived, and then died, leaving *E.* an only son by *D.* To this son *C.*, in 1819, by an instrument purporting to be her will, signed in the presence of, and attested by three witnesses, left all her real estate in fee, the instrument containing a provision that the property should go over to *C.*'s sister in case of *E.*'s dying in *C.*'s lifetime. *E.* shortly afterwards died a minor, intestate and without issue; Held, 1. that the instrument executed by *C.* in 1819, did not, as to the estates comprised in the fine, operate as an execution of *C.*'s power of appointment, but as a devise by her by force of her interest. 2. That *E.* took by descent from his mother, and not by purchase. *Langley* v. *Sneyd*. *Page* 243

DISTRESS.

Goods of the principal in the hands of his factor cannot be distrained by the landlord of the factor's premises for arrears of rent due to him from the factor. *Gilman* v. *Elton*. *Page* 75

DIVORCE.

See Practice, 4.

DRAINAGE.

See Limitation of Actions.

ESCAPE.

See Evidence, 1. 2., *and* Attachment.

EVIDENCE.

And see Bankruptcy, 1. Costs, 2, 8. Oath. Stamp, 1, 2, 3.

1. In an action for an escape, the sheriff's authority for appointing a bailiff, was proved by a person belonging to the sheriff's office, who had indorsed the bailiff's name on the writ produced: A verdict having been found for the Plaintiff, the Court refused to set it aside, holding, that this proof was sufficient. *Francis* v. *Neave*. 26

2. In an action for an escape, the writ in the former action being produced bearing an indorsement purporting to record the sheriff's delivery of a warrant to *B.*, and *B.*, on being called, stating that he had delivered the warrant to another, who did not produce it: Held, that it ought to have been left to the jury to say whether *B.* acted under the sheriff's authority. *Fermor* v. *Phillips*. *Page* 27.

3. Entries made by a deceased collector of taxes in a public book, handed down to him by his predecessor in office, and afterwards delivered to his successor, are evidence against his surety, in an action on a bond conditioned for the due performance of the collector's duty, and the delivery up of the books kept by him in his office.

   Quære, Whether the receipts signed by such collector, for monies payable to him in his official capacity, are evidence against his surety in such case. *Goss* v. *Watlington*. 132

4. The Defendants, assignees of a bankrupt, produced, under a notice from the Plaintiff (in an action for use and occupation), the deed of assignment of the bankrupt's effects: Held, that the deed was admissible in evidence, though not proved by the attesting witness, it having been shown that the Defendants occupied under the deed. *Orr* v. *Morrice*. 139

5. The copy of an original letter giving notice of the dishonour of a bill, is admissible in evidence, without notice to produce the original letter. By *C. P.*, after conference with *K. B.* *Kine* v. *Beaumont*. 288

6. In an action on an agreement to pay 100*l.*, if Plaintiff would not send herrings for one twelvemonth to the *London* market, and, in par-

 ticular,

GRANT.

See ANNUITY *and* DEEDS.

GUARANTEE.

1. "To the amount of 100*l.* consider me as security on *J. C*'s account, signed and dated:" Held, not a sufficient memorandum (under 29 *Car.* 2. *c.* 3. *s.* 4.) of an agreement to pay for the default of *J. C. Jenkins* v. *Reynolds*. *Page* 14
2. "I hereby guarantee the present account of *H. M.* due to *R. T. S.* of 112*l.* 4*s.* 4*d.* and what she may contract from this date to the 30th *September* next," (signed and dated): Held, that the consideration sufficiently appeared on the face of this instrument under 29 *Car.* 2. *c.* 3. *s.* 4. *Russell* v. *Mosely*. 211

HABEAS CORPUS.

See ATTACHMENT *and* PRACTICE, 6.

HYPOTHECATION.

See INSURANCE, 3.

INCLOSURE ACT.

See COMMISSIONERS.

INQUIRY.

See WRIT OF INQUIRY.

INSOLVENT DEBTOR'S ACT.

See ATTACHMENT. OFFICER OF COURT.

INSURANCE.

1. Insurance on a cargo of wine to be discharged partly at *B.*, partly at D., and partly at *L.* The vessel which conveyed the cargo, being wrecked near *B.*, and three-fourths of the cargo being either lost or so impregnated with salt water, as to render it imprudent to delay the sale till the ports of *D.* or *L.* could be reached, the assured, on the 23d of *December*, the day they heard of the loss, gave notice of abandonment; and, on the 27th of *December*, called a meeting of underwriters, which three underwriters attended, and ordered the assured to do the best for all parties. On the 28th of the ensuing *February*, and not before, some of the underwriters interfered, forbidding a sale of the damaged wines about to take place at *B.*, and rejecting the abandonment: Held, that this was a total loss, and entitled the assured to abandon; and that, at all events, the underwriters, not having stirred for more than two months after notice of the abandonment, must be taken to have acquiesced in it. *Hudson* v. *Harrison*. *Page* 97
2. An insurer, who rejects an abandonment, must do so within a reasonable time. *Ibid.*
3. Insurance for 8000*l.* on ship *Vittoria*, and 4000*l.* on freight, at and from *London* to the *East Indies* and back. The ship sailed seaworthy from *Calcutta* on her voyage home, when, in addition

to some damage which she sustained in the river *Hooghly*, she encountered two storms at sea, by which she was so shattered as to render it necessary for the captain to put back; and he returned to *Calcutta* on the 30th *August*, 1820. On his arrival at *Calcutta*, he gave notice of abandonment to the agents for *Lloyd's*, resident there, and requested that their surveyor might be present at the surveys of the ship. The agents said they had no authority to accept the abandonment; but their surveyor attended the surveys when it was found that the ship was so seriously damaged, that the expense of repairing her would be nearly 5000*l.* The agents refused to undertake the repairs; and the captain, having in vain attempted to borrow money for that purpose by hypothecation of *ship*, sold the ship for 1200*l.*, conceiving that to be the best course for all parties. On the 25th *April*, 1821, the captain arrived in *London*, where the owner resided; and, on the 3d *May*, the ship's papers were delivered. On the 5th *May*, the ship's brokers abandoned to the underwriters.

In an action on the policy on ship, the jury having found a verdict for the Plaintiff as for a total loss, and that the captain had sold the ship for a justifiable cause. The Court (*Richardson* J. *dissentiente*) refused to grant a new trial, which was moved for, on the ground that the ship ought not to have been sold, and that notice of abandonment had not been given in due time. *Read* v. *Bonham.* 147

4. Policy of insurance on ship and goods at and from *Cuba* to *Liverpool*, with liberty "in that voyage, to proceed and sail to, and touch and stay at, any ports or places whatsoever; and with leave to discharge and take in, at any ports or places she might touch at, without prejudice to that insurance." The insured, after subscription of the policy, inserted in the body of it, the words, "with leave to call off *Jamaica*," to which interpolation all the underwriters assented, without increase of premium, except the Defendant, who, being out of the way was not applied to. The captain sailed from *Cuba* with eight men, engaged to navigate to *Liverpool*, and two to *Jamaica*, being unable at *Cuba* to procure ten men (the proper complement of the crew) for *Liverpool*. She then touched at *Jamaica*, for the sole purpose of landing the two men, and procuring others in their stead; and, having accomplished his purpose, was lost on the voyage from *Jamaica* to *Liverpool*: Held,

1st, That this was a material alteration of the policy, and rendered it void.

2d, That the ship was not, as to the crew, sea-worthy for the whole voyage (as she ought to have been) when she sailed from *Cuba*.

3d, That the circumstance of her having become sea-worthy after her leaving *Cuba*, and before the loss, did not entitle the Plaintiff to

tinuances regularly entered down to the term before the trial of the action in C. P.: Held that the debt was not barred. *Gregory* v. *Hurrill.* Page 212

2. The 20 years within which a *formedon* in the *descender* ought to be commenced under the statute 21 *Jac.* 1. *c.* 16. begin to run when the title descends to the first heir in tail, unless he lie under a disability. *Tolson* v. *Kaye.* 217

MARRIAGE SETTLEMENT.

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See CARRIER. CHARTER-PARTY. PLEADING, 2.

NOTICE.

See CARRIER. EVIDENCE, 4, 5.

OATH.

On an application for a new trial, it appeared that a witness, who gave himself a false name at the trial, and was sworn on the gospels, was, at that time, a Jew: Held, that the objection came too late, and that the oath, as taken, subjected the witness to the consequences of perjury, if he had sworn falsely. *Sells* v. *Hoare.* Page 232

OFFICER OF COURT, (*his Liability.*)

An order drawn up in the name of the Court, by an officer of a court of justice, is, until amended or set aside, the order of the Court. Therefore, where an officer of the Insolvent Debtors' Court, instead of drawing up an order for the further imprisonment of an insolvent, pursuant to the decision of the Court, drew up an order for his discharge, and the insolvent was thereon discharged, the order not having been amended or set aside: Held, on demurrer to the declaration, that no action lay by a creditor of the insolvent against the officer, though the declaration stated that the officer *wrongfully*, falsely, and unlawfully, made out and issued such order, *purporting* to be an order from the Court. *Whitelegge* v. *Richards.* 188

OFFICER, PUBLIC, (*his Liability.*)

An action does not lie against a public officer by individuals for sums which, as a public officer, he is authorised to pay them, although he may have received the money applicable to that purpose: Held, therefore, that *assumpsit* does not lie against the secretary at war by a retired

PROCESS.

See PLEADING, 1.

PROMOTIONS.

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PROMISSORY NOTE.

See FORGERY, 2.

PRUSSIAN TREASURY NOTE.

See FORGERY, 2.

PUBLIC ENTRIES.

See EVIDENCE, 3.

QUARE IMPEDIT.

See ADVOWSON.

RECEIPTS.

See EVIDENCE, 3.

REFERENCE.

See COSTS, 11.

RENT ARREAR.

See DISTRESS.

REQUESTS, COURT OF.

By the *Rochester* court of requests' act, 22 *G.* 3. *c.* 27., debts under 40s. contracted within the jurisdiction of the court, are to be sued for in that court: by 18 *G.* 3. *c.* 51. the jurisdiction of the court is extended to sums not exceeding *5l.*; and Plaintiffs suing in the superior courts for sums recoverable under either of the acts, are to be refused costs, notwithstanding a verdict in their favour. But the latter act excludes any jurisdiction over debts being the balance of an account on demand, originally exceeding *5l.* The Plaintiff sued in a superior court for 31*l.* 5*s.* 1*d.*, ascertained by a surveyor, appointed by the Defendant and himself, to be due to him for measured work and labour, done within the jurisdiction of the court of requests. The Defendant proved payments to the amount of 24*l.* 18*s.*, and the jury estimating the work at only 26*l.*, found for the Plaintiff only 1*l.* 2*s.* damages: Held, that this was not a case in which the Defendant was entitled under 18 *G.* 3. *c.* 51., to enter a suggestion to deprive Plaintiff of his costs. *Harsant* v. *Larkin.* *Page* 257

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See INSURANCE, 4.

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See OFFICER, PUBLIC.

SHERIFF.

And see EVIDENCE, 1, 2.

1. A sheriff, who levies under a *levari facias* for a crown debt, is not entitled to poundage under the statute 29 *Eliz. c.* 4., and, consequently, an action against him under that act, for extortion in such a case, is misconceived. *Stevens* v. *Rothwell.* *Page* 143
2. Under an execution by *A.* against *B.*, the Court will not order the sheriff to pay over money in his hands levied on an execution by *B.* against *C.* *Padfield* v. *Brine.* 294

SHIP.

See INSURANCE, 3, 4.

STAMP.

1. A conveyance by debtors to trustees, in trust to sell, and with the proceeds to discharge, *first*, debts due to the trustees, *then* debts due to other creditors, with a resulting trust for the original debtors, does not require an *ad valorem* stamp, as upon a sale or mortgage under 55 *Geo.* 3. *c.* 184. By three Judges (*Dallas* C. J. *absente.*) *Coates* v. *Perry.* 48
2. Held, that an agreement (dated *October* 27. 1819, and stamped with a 20*s.* stamp) between landlord and tenant, that the landlord should have immediate possession, (except as was mentioned), of a farm, lands, and premises, which had been occupied by the tenant for a term, the landlord to take the stock, and the tenant to hold over half the house, half the stable, the barns, and an inclosed ground, and to have the joint use of the yard with the landlord or incoming tenant, till the 25th *January* following, without rent, &c. was properly rejected in evidence, on the ground that it operated as a surrender of the term, and therefore required a deed stamp, under 55 *Geo.* 3. *c.* 184. *sched. part* 1. *Williams* v. *Sawyer.* *Page* 70
3. Demise to *A.* of a slate pit at *B.*, and stone quarries at *C.*, to hold to *A.* the slate pit at *B.* from the 25th *March*, 1815, for the term of fourteen years, and the stone quarries at *C.* from the 29th *September*, 1817, for the term of fourteen years, paying for the slate pit the yearly rent of 70*l.*, and for the stone quarries the yearly rent of 130*l.* The *ad valorem* stamp on the first skin of the lease was 3*l.*, with a progressive duty of 1*l.* on the other skins. It appeared that possession could not be given of the stone quarries at the same time with the slate pit, nor till the time mentioned in the lease. The Court being of opinion that no fraud was intended: Held, that this lease was properly stamped under 55 *Geo.* 3. *c.* 184. *Boase* v. *Jackson.* 185

SUGGESTION.

See REQUESTS, COURT OF.

SUPERSEDEAS.

See PRACTICE, 6.

VARIANCE.

Covenant to pay (among other instalments), an instalment within twelve *calendar* months from, &c. On the record the word "calendar" was omitted; but the record stated correctly the time of payment of other previous and subsequent instalments, without omitting the word "calendar:" Held, that this was no variance. *Cockell* v. *Gray*. *Page* 186

WRIT OF ENQUIRY.

The jury having found for the Defendant on six out of eight pleas comprehended in the last two issues, and for the Plaintiff on the residue of those pleas, and on the first issue without assessing damages; and the Plaintiff having, pursuant to the decision of the Court of K. B., entered up as to the pleas

pleas found for the Defendant, judgment *non obstante veredicto*, with an award of a writ of enquiry; and final judgment for the damages found by the inquisition, &c.: a Court of Error (*Cam. Scacc.*) reversed the judgment of the Court of K. B., as to the award of the writ of enquiry and the final judgment thereon — remitted the record to the Court of K. B. — and directed that Court to award a *venire de novo* to try the first issue and the last, as far as related to the pleas on which the finding was for the Plaintiff; holding, that the verdict found for the Plaintiff on the first issue, and on the last (as far as regarded the pleas on which the finding was for the Plaintiff) was void, because no damages had been assessed. *Clement* v. *Lewis*. *Page* 297

THE END.

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